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No. 82-427

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ASHOK K. GUMBHIR,
Petitioner

vs.

KANSAS STATE BOARD OF PHARMACY,
Respondent

On Writ of Certiorari to the
Supreme Court of the State of Kansas

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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QUESTIONS PRESENTED

These questions pertain to a claim for attorneys' fees under 42 U.S.C. §1988 in a suit brought under 42 U.S.C. §1983 and under state law, where plaintiff recovered only on the state law claim.

1. Whether a court, in deciding whether to grant attorneys' fees under the Civil Rights Attorneys' Fees Act, 42 U.S.C. §1988, should undertake an independent re-evaluation of the merits of the plaintiff's federal constitutional claims. If so, what is the nature and extent of that evaluation?

2. Whether attorneys' fees should be awarded in an action under 42 U.S.C. §1983 where plaintiff has claimed both state and federal violations, but he prevails only on state law grounds. If so, under what circumstances should fees be granted?

3. Whether, in order for a prevailing party to obtain attorneys' fees under 42 U.S.C. §1988, it is necessary for the plaintiff's state law claims — upon which he prevailed — to arise from a nucleus of operative facts in common with the facts pertaining to the federal constitutional claims.

4. If question 3, above, is answered in the affirmative, then an additional Question is: Whether the plaintiff's state law claims and federal constitutional claims arise from "a common nucleus of operative fact", where the federal claims are not "frivolous", "wholly insubstantial" or "clearly without merit"?

5. If Question 3, above, is answered in the negative, so that a plaintiff must recover on the merits of his federal constitutional claims in order to recover

attorneys' fees under 42 U.S.C. §1988, then an additional Question is: whether the petitioner's federal constitutional claims in the present case were without merit.

ALL PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption of the case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ASHOK K. GUMBHIR,
Petitioner

vs.

KANSAS STATE BOARD OF PHARMACY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

Petitioner respectfully prays that a writ of certiorari issue to review the final judgment of the Supreme Court of the State of Kansas entered herein on June 11, 1982, which denied attorneys' fees to petitioner under 42 U.S.C. §1988 as a matter of law, although petitioner was the prevailing party in an action under 42 U.S.C. §1983.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Kansas is reported at 231 Kan. 507, 646 P.2d 1078 (1981). The earlier opinion of the Supreme Court of the State of Kansas, in which petitioner prevailed because the State statute was declared unconstitutional, is reported, under the same style, at 228 Kan. 579, 618 P.2d 837 (1980).

JURISDICTION

The judgment of the Supreme Court of the State of Kansas was made and entered on June 11, 1982, and a copy of the decision is appended to this Petition at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The original action filed by petitioner called into question the constitutionality of K.S.A. 65-1631(a), Appendix I, regarding the registration of pharmacists by the respondent, when viewed against the requirements of the First, Fifth and Fourteenth Amendments of the United States Constitution, Appendices C, D and E, as well as the separation of powers provision of the Constitution of the State of Kansas, Article 2, Section 1, Appendix F.

This case also involves a claim under 42 U.S.C. §1983, set forth in Appendix G. Having prevailed on his claim under 42 U.S.C. §1983, see Appendix B and Appendix A, 231 Kan. at 516, petitioner sought attorneys' fees under the Civil Rights Attorneys' Fees Act, 42 U.S.C. §1988, Appendix H, which states the following, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Petitioner received his undergraduate degree in pharmacy from Punjab University in Chandrigarh, India. He later received his masters degree in pharmacy from the University of Minnesota, and his Ph.D. in pharmacy administration from Ohio State University. Petitioner was registered as a pharmacist in the State of Ohio by examination and, by reciprocity, in the State of Missouri. Petitioner presently resides in Missouri where he is Professor of Pharmacy at the University of Missouri-Kansas City.

Petitioner made application to respondent — the Kansas State agency responsible for the registration of pharmacists — for registration by examination or by reciprocity. That registration was denied by respondent, based upon the Kansas statute, K.S.A. 65-1631(a), which required applicants to be recipients of undergraduate degrees from schools of pharmacy accredited by the American Council on Pharmaceutical Education (ACOPE). That Council accredits every single school of pharmacy within the United States of America, and accredits no school of pharmacy outside the United States.

Petitioner filed suit in the District Court of Johnson County, Kansas, claiming that the respondent infringed his constitutional rights and that the statute vesting authority in the ACOPE was unconstitutional on the following grounds:

> (a) the statute contains an impermissible, unconstitutional and undue delegation of authority to some private body or entity other than the Kansas

State Board of Pharmacy, and does not require nor permit defendant to exercise its own judgment;
(b) the statute is violative of the Commerce Clause, Art. 1, §8 of the Constitution of the United States;
(c) because the American Council on Pharmaceutical Education does not accredit nor approve colleges or universities other than those in the United States of America, the statute is discriminatory and violative of the First, Fifth and Fourteenth Amendments of the Constitution of the United States, and is an improper delegation of authority;
(d) the statute is unconstitutionally vague, ambiguous and susceptible of various interpretations.
(R. Vol. I, pp. 4-5)

The district court found for respondent (R. Vol. I, p.32), and the petitioner appealed directly to the Kansas Supreme Court. (R. Vol. I, p.33) Although both state constitutional and federal constitutional grounds were alleged for reversal of the decision, the Kansas Supreme Court found the statute violative of the Kansas Constitution and, therefore, did not reach the federal constitutional grounds raised in the Petition. Appendix B, 228 Kan. at 588.

On remand, after first having to file a motion for contempt (R. Vol. I, pp. 62-73), the petitioner was finally granted registration as a pharmacist.

Petitioner then filed a Motion for Assessment of Attorneys' Fees under 42 U.S.C. §1988. (R. Vol. I, pp.74-76). The district court's denial of that motion was appealed to the Kansas Supreme Court (R. Vol. I, p.43), which issued the opinion and decision here at issue. Appendix A.

The Kansas Supreme Court held correctly for petitioner on most of the substantive issues, including the following:

1. The petitioner's claim was brought under 42 U.S.C. §1983, although that statute was not specifically mentioned in the Petition. 231 Kan. at 514.

2. An action under 42 U.S.C. §1983 may be brought in the state courts of the State of Kansas. 231 Kan. at 509.

3. Respondent, the Kansas State Board of Pharmacy, is a "person" under 42 U.S.C. §1983. 231 Kan. at 513.

4. The conduct of the respondent complained of by petitioner was performed under color of state law. 231 Kan. at 517.

5. Because attorneys' fees are assessed as "costs", they may be paid from state funds without violating the Eleventh Amendment. 231 Kan. at 513.

6. Attorneys' fees under 42 U.S.C. §1988 are an appropriate subject for relief even though that statute was not specifically mentioned in the Petition. 231 Kan. at 514-515.

7. Petitioner was the "prevailing party", because he succeeded in obtaining what he originally set out to obtain. 231 Kan. at 516.

Having found for petitioner on every issue up to that point, the Kansas Supreme Court then reviewed the merits of the federal constitutional claims (a review it did not undertake on the first appeal), in order to determine whether the federal claims arose "from a common nucleus of operative facts". The Kansas Supreme Court read *Seals v. Quarterly County Court*,

562 F.2d 390 (6th Cir. 1977), as requiring such nucleus of facts in common between the state claims (on which plaintiff prevailed) and the federal claims (which were not reached) to justify an award of attorneys' fees under §1988.

The Kansas Supreme Court then proceeded to examine each of petitioner's federal constitutional claims and to decide the validity of each. Finding each claim not to be sustained on the merits, the court concluded that the federal constitutional claims did not involve a common nucleus of operative fact with the federal claims. 231 Kan. at 523. The Kansas Supreme Court made no finding that the federal constitutional claims were "clearly without merit" or "frivolous" or "wholly insubstantial".

REASONS FOR GRANTING THE WRIT

I. THE ISSUES PRESENTED ARE NOVEL TO THIS COURT.

The opinion of the Court below decided important questions of federal law which have not been settled by this Court. See, Rule 17.1(c), Rules of the Supreme Court. The Kansas Supreme Court decided that an in-depth evaluation of the merits of federal constitutional claims must be undertaken and that there must have been merit to those federal claims before attorneys' fees can be granted under 42 U.S.C. §1988, where plaintiff has already prevailed on state law grounds in the same case. This decision by a state court of last resort has decided a federal question in a

way which conflicts with decisions of numerous federal courts of appeals. See Rule 17.1(b), Rules of the Supreme Court. Petitioner submits that, instead, a review of the federal claims should be undertaken only to determine whether they were "clearly without merit", "frivolous" or "wholly insubstantial". See, *Northcross v. Board of Education*, 611 F.2d 624 (6th Cir. 1979), cert. den. 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980).

A. The examination and evaluation by the Kansas Supreme Court violates two basic rules of judicial action: (1) that the Courts shall resolve all claims on state law grounds, if possible, in order to avoid declarations on federal constitutional grounds, *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); and (2) that the Courts shall refrain from issuing advisory opinions. *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073, reh. den. 439 U.S. 883, 99 S.Ct. 227, 58 L.Ed.2d 198 (1978).

The main issue in this case is the nature and extent of the consideration to be given to a plaintiff's federal constitutional claims, once he has prevailed on state law grounds, in order to decide whether to award attorneys' fees. If a detailed evaluation of the merits of those claims is to be undertaken by the courts, then there will exist a ruling on federal constitutional issues which should have been precluded by the principle announced by this Court in *Hagans v. Lavine, supra.*

Further, because it is not necessary to a determination of the merits of the case, but only relates to the assessment of the costs, *Hutto v. Finney*, 437

U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), the review and statement of the court's opinion on the merits of the federal constitutional claims is advisory in nature. Such a ruling would infringe the principle announced by this Court in *Barthuli v. Board of Trustees*, 434 U.S. 1337, 98 S.Ct. 21, 54 L.Ed.2d 52 (1977), which held that appellate courts can only determine the parties' rights as they stand at the time of the decision. In this case, the statute had already been declared unconstitutional, so the parties' rights had already been determined. It was only advisory then to review the federal constitutionality of the statute which had already been held unconstitutional.

The petitioner submits that the correct standard is to require only that the federal claims arise from a "common nucleus of operative fact", that is, that the federal claims not be frivolous or insubstantial. This is quite different from the standard applied by the Kansas Supreme Court that requires the federal claims to have substantive merit before attorneys' fees will be granted. While petitioner still believes that his federal claims against the respondent were meritorious, petitioner further believes that the Kansas Supreme Court should be required to review the federal claims under the proper, and less stringent, standard.

B. The issue presented here is novel in this Court. Other courts which have considered the issue have only undertaken or required an evaluation of the federal claims to determine whether the federal claims, on their face, were "plainly insubstantial", "frivolous",

or "clearly without merit".[1] When combined with the general principle that prevailing plaintiffs should ordinarily be granted their attorneys' fees in the absence of extraordinary circumstances, *Mid-Hudson Services, Inc. v. G. & U., Inc.*, 578 F.2d 34 (2nd Cir. 1978), the review procedure prescribed by those courts is clearly more in accord with the ends of justice than that imposed by the Kansas Supreme Court in the present case. Petitioner requests this Court to resolve that disparity in opinions and to hold that attorneys' fees should be awarded to the plaintiff prevailing on state law grounds unless the federal claims were frivolous, wholly insubstantial or clearly without merit.

II. THE ISSUES PRESENTED ARE OF IMPORTANCE TO THIS COURT.

In Addition to being novel, the questions presented here are important to the administration and application of the Civil Rights Attorneys' Fees Act. The Kansas Supreme Court's imposition of such a hurdle to plaintiffs' recovery of attorneys' fees runs contrary to the general attitude which favors attorneys' fees awards in the type of case which is beneficial to society, such as the present case, *Arkansas Community Organizations for Reform Now v. Arkansas State Board of Optometry*, 468 F.Supp. 1254 (E.D. Ark. 1979), unless "special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968).

1. See, e.g. *Southeast Legal Defense Group v. Adams*, 436 F.Supp. 891 (D. Ore. 1977); *Keith v. Volpe*, 86 F.R.D. 565, 569 (C.D. Cal. 1980); *Morgan v. McDonough*, 511 F.Supp. 408, 414 (D. Mass. 1981). See also, *Nadeau v. Helgemoe*, 518 F.2d 275 (2nd Cir. 1978).

III. PETITIONER PROPOSES A STANDARD TO RESOLVE THE DISPARITY OF DECISIONS.

A. Petitioner submits that this Court should hold that the standard to be applied in cases of this nature is that the state law claims should arise from a nucleus of operative fact in common with the federal claims, but that an evaluation of the merits of the federal claims is unnecessary and impermissible. Such a standard will preclude the joinder of plainly insubstantial federal claims under 42 U.S.C. §1983 with ordinary tort claims merely in the hope of obtaining attorneys' fees under 42 U.S.C. §1988. But the standard will preserve the beneficent intention of §1988 of aiding in the vindication of constitutional rights.

B. The term "common nucleus of operative fact" had its genesis in the decisions relating to pendent jurisdiction in the federal courts. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

The major error of law by the Kansas Supreme Court in this case was its misinterpretation of the "common nucleus of operative fact" standard. Rather than requiring an evaluation of the merits of the previously undecided claims, this standard only requires a determination of the "substantiality" of the undecided claims, i.e., whether the claims are "wholly insubstantial", "obviously frivolous", "plainly insubstantial" or "obviously without merit." *Hagans v. Lavine, supra*, 415 U.S. at 537. See also *California Water Service Company v. Redding*, 304 U.S. 252, 58 S.Ct. 865, 82 L.Ed. 1232 (1938). The state law claim and the federal law claim must be interrelated so that the

plaintiff would be expected to try them in a single judicial proceeding. *United Mine Workers v. Gibbs, supra,* 383 U.S. at 725.

Even an adverse determination on the related claims did not automatically preclude federal jurisdiction over the pendent claims in *Hurn v. Oursler,* 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148 (1933), and *Armstrong Paint & Varnish Works v. Nu-Enamel Corporation,* 305 U.S. 315, 59 S.Ct. 191, 83 L.Ed. 195, reh. den. 305 U.S. 675, 59 S.Ct. 356, 83 L.Ed. 437 (1938). Thus, the determination of the merits of petitioner's federal claims in the present case was a misapplication of the "common nucleus of operative fact" standard.

C. This "common nucleus" standard has been applied consistently by the lower courts in cases involving 42 U.S.C. §1988 where plaintiff has already recovered on state law grounds.[2]

The number of cases cited demonstrates that this issue is being raised regularly in the lower courts and that it should be resolved by this Court.

Further, the principle proposed by petitioner is consistent with the inclination and history of the courts

2. See, *Seals v. Quarterly County Court, supra,* 562 F.2d 390 (6th Cir. 1977); *Southeast Legal Defense Group v. Adams,* 436 F.Supp. 891 (D. Ore. 1977); *White v. Beal,* 447 F.Supp. 788 (E.D. Pa. 1978); *Bond v. Stanton,* 555 F.2d 172 (7th Cir. 1977); *Lund v. Affleck,* 442 F.Supp. 1109 (D. R.I.), aff'd. 587 F.2d 75 (1st Cir. 1978); *Gagne v. Maher,* 594 F.2d 336 (1st Cir. 1979); *Northcross v. Board of Education, supra,* 611 F.2d 624 (6th Cir. 1979), cert. den. 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980); *Kimbrough v. Arkansas Activities Association,* 574 F.2d 423 (8th Cir. 1978); *Oldham v. Erlich,* 617 F.2d 163 (8th Cir. 1980); *Peeler v. Longview Independent School District,* 485 F.Supp. 117, 121 (E.D. Tex. 1979); *Burchett v. Bower,* 470 F.Supp. 1170 (D. Ariz. 1979).

in awarding attorneys' fees under 42 U.S.C. §1988 even where there has been a settlement or consent decree, thus precluding any determination of the particular ground (i.e. federal or state) upon which the plaintiff recovered. *Mental Patient Civil Liberties Project v. Hospital Staff Civil Rights Committee,* 444 F.Supp. 981 (E.D. Pa. 1977); *Willett v. Chester Water Authority,* 447 F.Supp. 967 (E.D. Pa. 1978); *Inmates of Nebraska Penal and Correctional Complex v. Greenholz,* 567 F.2d 1381 (8th Cir. 1977).

D. The use of this approach to the "common nucleus" standard in §1988 cases is justified by the legislative history of 42 U.S.C. §1988, which also demonstrates that Congress anticipated the cases where plaintiffs recover on state law claims thereby precluding consideration of their federal law claims.

> In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans v. Lavine,* 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, see *Hagans v. Lavine, supra; United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), attorney's fees may be allowed even though the court declines to enter judgment for plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.'
>
> *H.R. 94-1558,* 94th Cong., 2d Sess., p.4, n.7 (1976).

This history demonstrates the congressional concern that plaintiffs not be denied their attorneys'

fees merely because they recovered on state law grounds. The Congressional intent is to deny fees only where the federal claims were insubstantial.

E. Why should the courts allow attorneys' fees under 42 U.S.C. §1988 even where the associated federal claims brought under 42 U.S.C. §1983 do not appear, retrospectively, to have been sustainable on the merits?

First, the Civil Rights Attorneys' Fees Act was designed to encourage the assertion of the public interest, and §1988 is to be liberally construed in favor of granting attorney's fees to the party who prevails. *Collins v. Chandler Unified School District*, 644 F.2d 759 (9th Cir. 1981); *Dennis v. Chang*, 611 F.2d 1302 (9th Cir. 1980). Thus, the Attorney's Fees Act should be interpreted to allow attorney's fees in those cases in which plaintiff prevails and, in so doing, asserts the public interest. The only proviso should be that plaintiff must not have joined a federal claim frivolously or without any foundation. If there was at least arguable foundation for asserting the federal claims at the outset, and the plaintiff does ultimately prevail, then the public interest has been asserted, a sufficient federal nexus has been established, and attorney's fees should be awarded.

Secondly, to permit a review of the merits of the federal claims only to determine the attorneys' fees claim, would encourage post hoc rationalization by the court; the announced decision on the merits of the federal constitutional claims might well be colored by the court's view of whether attorneys' fees should be granted in that particular case. Cases of constitutional

dimension should be decided, if at all solely for the purpose of determining the substantive issues and rights of the parties before it. Such decisions should not be made solely as a first step toward deciding whether to grant attorneys' fees to the prevailing party. Discretion is expressly built into §1988, so that such rationalizations under the guise of considering the merits of the federal claims should be unnecessary.

Thirdly, the statute itself does not require that the prevailing party have obtained his results under the various cited Civil Rights Act in order to receive attorneys' fees. Section 1988 provides that attorneys' fees may be granted to the prevailing party "(i)n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title..." From this it is apparent that Congress did not intend to require a party to prevail on the merits of a claim brought under the Civil Rights Acts, but only to prevail, i.e. obtain results, in an action to enforce those Acts. See, S.Rep. No. 1011, 94th Cong., 2d Sess. 5, reported in 1976 U.S. Code Cong. & Admin. News, pp. 5908, et seq.:

> (F)or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.

IV. PETITIONER'S FEDERAL CONSTITUTIONAL CLAIMS WERE MERITORIOUS.

If a consideration of the merits is necessary and if the Kansas Supreme Court was, therefore, correct in its interpretation of the court's task under 42 U.S.C. §1988, then that Court erred in finding that petitioner's claims under the United States Constitution could not be sustained on their merits. This Court should grant certiorari in order to resolve this matter because the Kansas Supreme Court's decision is contrary to decisions of other courts and decisions of this Court. Petitioner continues to contend that the state statute which required applicants for registration to be recipients of undergraduate degrees from schools approved by the ACOPE was violative of petitioner's right to equal protection under the law and that the classification scheme was not reasonably calculated to achieve its stated objective. The statute also violated petitioner's liberty interest under the Fourteenth Amendment.

A. The statute as worded did not advise applicants for registration of the requirements necessary for their applications to be considered and approved. Standards applicable to the practice of one's profession must be reasonable and based upon valid and sustainable grounds. *Morey v. Doud*, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1956). That rule includes the need for specificity to apprise prospective registrants of what the law requires. Because no reference or implication was contained in the statute that domestic *undergraduate* degrees are required, the statute was unconstitutional as being vague and as not giving

notice of what was required to comply therewith. The statute was not set out in terms that the ordinary person exercising ordinary common sense could sufficiently understand and comply with.

B. The statute also violated the equal protection clause of the Fourteenth Amendment because it created an unreasonable classification. The classes created by the statute, as interpreted by respondent, were (1) those who received *undergraduate* degrees from a school or college of pharmacy accredited by the ACOPE, i.e., an American university, and (2) all other pharmacists, no matter how highly qualified, even though they may have graduated (by receiving post-graduate, masters or doctoral degrees) from schools, colleges or universities accredited by the ACOPE. There was no reasonable justification for such classifications and the statute operated to the constitutional detriment of those who were in fact qualified but who did not meet the arbitrary statutory provisions as interpreted.

This question was directly confronted in *Wong v. Hohnstrom*, 405 F.Supp. 727 (D. Minn. 1975). In that case, an alien was licensed to practice pharmacy in the States of California and Nevada. Upon moving to Minnesota, he applied for registration by examination in that state. The registration statute in Minnesota provided that aliens could not apply for registration as pharmacists in that State. In ruling that statute to constitute a violation of the equal protection clause of

the Fourteenth Amendment of the United States Constitution, the Court held.:

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the (Fourteenth) Amendment to secure...
>
> By denying aliens the opportunity to take the examination to become a registered pharmacist, the State of Minnesota has denied them access to one of the 'common occupations of the community.'

405 F.Supp. at 729.

The Court thus concluded that denying aliens the right to become registered in the State as pharmacists denied the applicants their equal protection under the law.

As a citizen of the United States of America at the present time, one of the remaining vestiges of petitioner's alien birth is the fact of his graduation from Punjab University in Chandrigarh, India. It is this vestige of his alien birth for which the respondent sought to punish plaintiff by denying him registration and enforcing the invalid statute. The right to practice his profession unhindered by unreasonable classification schemes is "the very essence of the personal freedom and opportunity" that petitioner sought in coming to the United States of America. Being highly qualified to perform his chosen work, a professor of widely recognized ability, petitioner was met by the respondent with an archaic and discriminatory response: that he was not "qualified".

Petitioner submits that the classification scheme established by the Kansas pharmacy registration statute was not reasonably calculated to obtain its intended purpose, but that, in fact, this Court should strictly scrutinize the classification scheme and evaluate the invalidity of the alleged basis therefor. *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 29 L.Ed. 2d 534 (1971); *Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973); *United States v. Karnes*, 437 F.2d 284 (9th Cir. 1971).

Respondent contended below that the classification scheme was valid and reasonable because it prevented "unqualified" pharmacists from becoming registered to practice in Kansas and thereby protected Kansas citizens from untoward or unexpected incidents from incorrect prescriptions.

The classification scheme failed to accomplish that end for at least two reasons.

First, the classification excluded a potentially great number of persons, such as petitioner, who are qualified to practice by reason of their attending schools which the ACOPE, for unknown and possibly discriminatory reasons, did not choose to accredit, i.e., schools which are located outside the United States. The classification scheme also excludes those applicants, such as the petitioner, who have received post-graduate degrees from accredited schools but who received their undergraduate degrees from unaccredited (foreign) schools of pharmacy.

Secondly, there is no guarantee that the fact of graduation from an ACOPE accredited undergraduate

school of pharmacy automatically renders the applicant qualified to practice in this State.

That is especially true when the Board made no inquiry into the ACOPE's standards or the application of those standards by the ACOPE. The respondent conceded below that it did not review or apply the ACOPE's standards, but merely approved or disapproved an applicant based on whether the applicant's undergraduate school was listed on the ACOPE list. (R. Vol. II, p.9)

The respondent had no knowledge of what standards, if any, the ACOPE utilized in arriving at its list of "accredited" schools. How could it then argue that the ACOPE accreditation assures quality of pharmacy practice in the State of Kansas?

A classification scheme under a licensing statute must be reasonable in order to satisfy the equal protection clause. *Bradley v. Richmond*, 227 U.S. 477, 33 S.Ct. 318, 57 L.Ed. 603 (1913). Classifications based upon alienage have consistently been held suspect under the Fourteenth Amendment, requiring strict scrutiny by the Court of the rationale claimed to support such distinctions. Petitioner contends that this is no less true when a vestige of alienage still provides the basis for such distinction.

Because petitioner was not permitted to practice his chosen profession in the State of Kansas, he was being denied a liberty interest under the due process and equal protection clauses of the Kansas and United States Constitutions.

> In so far as a man is deprived of the right to labor his liberty is restricted...
>
> *Smith v. Texas*, 233 U.S. 630, 636, 34 S.Ct. 681, 58 L.Ed. 1129 (1914).

Respondent has a constitutionally secured right to practice his profession.

> The Fourteenth Amendment guarantees an individual the right to engage in any of the common occupations or professions of life. Such a right is both a "liberty" and "property" right protected from state deprivation or undue interference. *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959); *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Larkin v. Bruce*, 352 F.Supp. 1076 (Wis. 1972).
>
> *Keker v. Procunier*, 398 F.Supp. 756, 760 (E.D. Cal. 1975).

Because the petitioner has a constitutional right of liberty and property, strict scrutiny of any classification scheme affecting those rights must be made by the Court to determine whether there is a reasonable basis for the classification. As shown above, there was no reasonable basis for the classification, it violated constitutional rights, and there were numerous reasonable alternatives. The Board should have been compelled to use, rather than ignore, some reasonable standards in registering pharmacists to practice in this State. Because the Board did not use any standards and because the statute violated appellant's right to due process and equal protection, it should now be held to have been unconstitutional under the Fourteenth Amendment.

The above review demonstrates that the decision by the Kansas Supreme Court on the merits of petitioner's federal constitutional claims was not only unnecessary in light of the "common nucleus" standard, but was, also, erroneous if the "common nucleus" standard is not applied. The registration statute infringed petitioner's federal constitutional rights and, therefore, petitioner should be held to be the "prevailing party" even under this higher standard.

V. CONCLUSION.

In conclusion, petitioner respectfully requests that a writ of certiorari issue to the Kansas Supreme Court so that these novel and important issues may be resolved.

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APPENDIX A

No. 53,610

ASHOK K. GUMBHIR, *Appellant*, v. KANSAS STATE BOARD OF PHARMACY, *Appellee*.

SYLLABUS BY THE COURT

1. CIVIL RIGHTS—*Attorney Fees—Action May Be Brought in State Court.* Actions to enforce 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Awards Act, may be brought in state court.

2. SAME—*Federal Act—State Agency May Be "Person" within Act.* A state agency is considered a "person" under the provisions of 42 U.S.C. § 1983.

3. SAME—*Federal Act—Attorney Fees—Pleadings.* 42 U.S.C. § 1983 need not be specifically pled in the original pleadings in order for a court to award attorney fees under 42 U.S.C. § 1988. Although the better practice is to specifically plead § 1983, it is enough if the original action is within the spirit of 42 U.S.C. § 1983.

4. ATTORNEY FEES—*Request for Fees—Time Limit in Which to Make Request.* A request for attorney fees is not a motion to alter or amend the judgment and need not be filed within the time period applicable thereto. In the future, motions for attorney fees should be filed within thirty (30) days after the entry of final judgment.

5. CIVIL RIGHTS—*Attorney Fees—"Prevailing Party."* A person is a "prevailing party" within the context of 42 U.S.C. § 1988 when he essentially succeeds in obtaining the relief he seeks in his claims on the merits.

6. ATTORNEY FEES—*Federal Civil Rights Action.* Under 42 U.S.C. § 1988 the prevailing party should ordinarily be awarded attorney fees unless there are special circumstances making such award unjust.

7. STATUTES—*Constitutionality—Vagueness.* The test for determining whether a statute is unconstitutionally vague is whether an ordinary person exercising ordinary common sense can understand and comply with the statute.

8. PUBLIC HEALTH—*Pharmacists—Educational Qualifications—Constitutionality of Statute.* K.S.A. 1979 Supp. 65-1631(*a*) is not based on the trait of alienage. The practice of pharmacy is not a fundamental interest. Any equal protection analysis of the statute is thus based on the "rational relation" test. Since the classification made by K.S.A. 1979 Supp. 65-1631(*a*) is rationally related to the State's interest in ensuring a competent field of practicing pharmacists, the statute does not deny equal protection.

9. CIVIL RIGHTS—*Attorney Fees—Denial of Fees Upheld.* In a request for costs pursuant to 42 U.S.C. § 1988 it is *held:* The trial court did not err in denying appellant's motion for attorney fees.

Appeal from Johnson district court; HERBERT W. WALTON, judge. Opinion filed June 11, 1982. Affirmed.

J. Nick Badgerow, of McAnany, Van Cleave & Phillips, P.A., of Kansas City, argued the cause and was on the brief for the appellant.

Robert E. Davis, of Davis, Davis, McGuire & Thompson, Chartered, of Leav-

enworth, argued the cause and *John F. Thompson*, of the same firm, was with him on the brief for the appellee.

The opinion of the court was delivered by

HERD, J.: This is an action for attorney fees under authority of 42 U.S.C. § 1988, growing out of this court's previous opinion in *Gumbhir v. Kansas State Board of Pharmacy*, 228 Kan. 579, 618 P.2d 837 (1980).

Ashok K. Gumbhir received a bachelor's degree in pharmacy from Punjab University in Chandrigarh, India. Later he immigrated to the United States where he now resides. After moving to this country, Gumbhir earned a masters degree in pharmacy from the University of Minnesota. He subsequently obtained his Ph.D in pharmacy administration from Ohio State University and was registered as a pharmacist in Ohio. Appellant made application for such registration in Kansas. His application was denied by the Kansas State Board of Pharmacy. He appealed the Board's ruling to the district court, alleging K.S.A. 1979 Supp. 65-1631(*a*), the registration statute, was unconstitutional on the following grounds:

"(a) The statute contains an impermissible, unconstitutional and undue delegation of authority to some private body or entity other than the Kansas State Board of Pharmacy, and does not require nor permit defendant to exercise its own judgment;

"(b) the statute is violative of the Commerce Clause, Art. 1, § 8 of the Constitution of the United States;

"(c) because the American Council on Pharmaceutical Education does not accredit nor approve colleges or universities other than those in the United States of America, the statute is discriminatory and violative of the First, Fifth and Fourteenth Amendments of the Constitution of the United States, and is an improper delegation of authority;

"(d) the statute is unconstitutionally vague, ambiguous and susceptible of various interpretations."

The district court upheld the Board's decision, but on appeal the Supreme Court reversed. This court held K.S.A. 1979 Supp. 65-1631(*a*) was violative of the Kansas Constitution, Article 2, § 1, in that it resulted in an unconstitutional delegation of legislative authority to a nongovernmental agency. Thus, the court found it unnecessary to reach the other constitutional issues raised by appellant. *Gumbhir v. Kansas State Board of Pharmacy*, 228 Kan. at 588. In light of this decision Dr. Gumbhir became registered as a pharmacist in Kansas on February 8, 1981.

In April of 1981, Dr. Gumbhir filed a "Motion for Assessment

of Costs," requesting that the district court assess all costs and attorney fees incurred in this matter against the appellee pursuant to the authority of 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Awards Act. The district court denied the motion and Dr. Gumbhir has appealed.

The sole issue on this appeal is whether the district court erred in denying appellant's request for attorney fees under the provisions of 42 U.S.C. § 1988.

First let us examine the provisions of 42 U.S.C. § 1988 (Supp. IV 1980), which provide in pertinent part:

"In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, [20 U.S.C. 1681 et seq.] or title VI of the Civil Rights Act of 1964, [42 U.S.C. 2000d et seq.] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Appellant claims his original action qualifies as one "to enforce a provision of § 1983." 42 U.S.C. § 1983 (Supp. IV 1980), provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

As a preliminary matter, the propriety of state courts enforcing federal civil rights statutes should be examined. In *Martinez v. California*, 444 U.S. 277, 62 L.Ed.2d 481, 100 S.Ct. 553 (1980), the court held actions under 42 U.S.C. § 1983 may be brought in state courts. Similarly, in *Maine v. Thiboutot*, 448 U.S. 1, 65 L.Ed.2d 555, 100 S.Ct. 2502 (1980), the court applied § 1988 to a civil rights action brought in state court. Thus, it is apparent federal civil rights statutes are enforceable by state courts.

In considering the full import of this case it is necessary to bear in mind the history and purpose of the Civil Rights Attorney's Fees Awards Act. It was signed into law October 19, 1976, by President Gerald Ford for the purpose of rescuing more than a decade of judicial decision-making which had, prior to May 12, 1975, made attorney fees available in most public interest cases. Prior to the late 1960's the practice of allowing attorney fees as a

part of the costs in public interest litigation was virtually unheard of. Civil rights plaintiffs were required to obtain counsel pro bono publico; to pay from their own pockets for litigating cases usually resulting in injunctive relief of value to large numbers of people with no damages from which a fee could be extracted; or to forget the rights existed because enforcement was too expensive. Civil rights were luxuries, not rights.

The situation changed in 1964. The Comprehensive Civil Rights Act passed. It provided for fee shifting upon proof of discrimination in public accommodations and employment. Realizing the federal government would be unable to handle all the cases involving this type of discrimination, the right to bring private enforcement actions was included in the act. It also provided for attorney fees as a vehicle for private enforcement because the beneficiaries generally lack the means to bring private suits.

The Supreme Court in *Newman v. Piggie Park Enterprises,* 390 U.S. 400, 19 L.Ed.2d 1263, 88 S.Ct. 964 (1968), expanded the legislative scheme by ruling even though Congress had made fee awards in discrimination cases in public accommodations technically "discretionary," it would be a rare case in which fees would not be automatic. The court reasoned plaintiffs in such cases were "private attorneys general," and it would be unfair to tax such plaintiffs with the cost of doing the work benefiting the whole country. See *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 45 L.Ed.2d 280, 95 S.Ct. 2362 (1975); *Jeanty v. McKey & Poague, Inc.,* 496 F.2d 1119 (7th Cir. 1974); *Northcross v. Memphis Board of Education,* 412 U.S. 427, 37 L.Ed.2d 48, 93 S.Ct. 2201 (1973). In 1970, the Supreme Court again expanded the concept of fee shifting in *Mills v. Electric Auto-Lite,* 396 U.S. 375, 24 L.Ed.2d 593, 90 S.Ct. 616 (1970), where the plaintiff proved the use of misleading proxy statements. Because plaintiffs had benefited the corporation, shareholders and general public by disclosing the corporation's lawlessness, the court reasoned it would be unfair for plaintiffs to bear the cost of the litigation. Following the foregoing cases, lower courts began to award fees in cases of all kinds, reasoning that whenever a private citizen sues to prevent a violation of the law, and thus provides the benefit of therapeutic enforcement for others as well as himself, he should not have to pay.

Attorney fee awards became increasingly common in suits involving school desegregation, jury discrimination, teacher dismissal, first amendment violations, unreasonable searches, legislative redistricting, prisoners' rights, union matters, police harassment and consumer and environmental problems. Congress kept pace with the courts by making fees virtually automatic in certain areas of public interest law, among them school desegregation, voting rights, and certain types of consumer and environmental litigation.

The recognition of the concept of "private attorneys general" by the Congress and the courts had a salient impact on public interest law. Public interest law firms as well as major firms began to recognize there was a new area of lucrative practice. Fee awards made civil rights law a financially viable practice.

However, in 1975, in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 44 L.Ed.2d 141, 95 S.Ct. 1612 (1975), the U.S. Supreme Court reversed the trend, holding the private attorney general rationale was applicable to public interest litigation only when specifically authorized by Congress. *Alyeska* was a drastic remedy for a practice the court apparently reasoned was getting out of hand. It held 28 U.S.C. § 1923 (1970) deprived courts of the equitable power to award fees in private attorney general cases, notwithstanding an unbroken line of cases since 1881 holding courts possess such equitable powers where necessary to obtain justice.

As a direct result of *Alyeska*, Congress passed the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (1976). In *Alyeska* the court abolished fee shifting under the "private attorney general" theory absent statutory authority. Section 1988 provided the statutory authority for the rationale and strengthened it by removing the uncertainty which characterized the theory before *Alyeska*. From the legislative history we must conclude that in order to achieve this congressional purpose to encourage compliance with and enforcement of civil rights laws, section 1988 should be construed liberally in favor of litigants who prevail in actions under 42 U.S.C. § 1983. *Collins v. Chandler Unified School Dist.*, 644 F.2d 759 (9th Cir. 1981); *Dennis v. Chang*, 611 F.2d 1302 (9th Cir. 1980).

For Dr. Gumbhir to prevail in his efforts to apply § 1988 to his action, he must first demonstrate his action was brought to en-

force a provision of § 1983. Initially, let us examine the issue of whether the Kansas State Board of Pharmacy is considered a "person" under § 1983. Prior to 1977, the courts were almost unanimous in holding state agencies were not "persons" under § 1983. See, *e.g., Edelberg v. Illinois Racing Bd.*, 540 F.2d 279 (7th Cir. 1976); *Cheramie v. Tucker*, 493 F.2d 586 (5th Cir. 1974), *cert. denied* 419 U.S. 868 (1974); *Allison v. California Adult Authority*, 419 F.2d 822 (9th Cir. 1969). However, in 1978 the court changed the rule with its decision in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978), where it stated: "municipalities and other local government[s] [are] to be included among those persons to whom § 1983 applies." 436 U.S. at 690. *Monell* softened the old notion a state agency was not a person within the meaning of § 1983. Since then the courts are divided on the question. Some limit *Monell* to its facts, applying a literal translation that a state and its agencies are not "persons." See *Florida Businessmen, Etc. v. State of Fla.*, 499 F. Supp. 346 (N.D. Fla. 1980); *Clark v. People of State of Mich.*, 498 F. Supp. 159 (E.D. Mich. 1980). Others have merely denied suit, holding the *Monell* decision did nothing to abrogate the states' traditional immunity. See *Ginter v. State Bar of Nevada*, 625 F.2d 829 (9th Cir. 1980); *Burkey v. Marshall Cty. Bd. of Ed.*, 513 F. Supp. 1084 (N.D. W.Va. 1981); *Holladay v. State of Mont.*, 506 F. Supp. 1317 (D. Mont. 1981). However, even if the state or its agencies are considered a "person" after *Monell*, it has been held they are still immune from § 1983 suits under the 11th Amendment to the U.S. Constitution. See, *e.g., Zentgraf v. Texas A & M University*, 492 F.Supp. 265 (S.D. Tex. 1980). This theory was advanced by the U.S. Supreme Court in *Quern v. Jordan*, 440 U.S. 332, 59 L.Ed.2d 358, 99 S.Ct. 1139 (1979). Although it did not specifically state the term "person" did not include "state," *Quern* held Congress, in enacting § 1983, did not intend to abrogate the 11th Amendment immunity and thereby force the states to answer in federal court for punitive constitutional violations. In spite of the Supreme Court's careful avoidance of the issue, some courts have read into *Quern* a prohibition on states ever being "persons" under § 1983. See *State v. Green*, 633 P.2d 1381 (Alaska 1981); *Boldt v. State*, 101 Wis.2d 566, 305 N.W.2d 133 (1981); *Edgar v. State*, 92 Wash. 2d 217, 595 P.2d 534 (1979), *cert. denied* 444 U.S. 1077 (1980).

On the other hand, other post-*Monell* decisions have permitted § 1983 actions against a state and its agencies. Some find it inconsistent to hold municipalities are "persons" while state agencies are not. See, *e.g., Atchison v. Nelson*, 460 F. Supp. 1102 (D. Wyo. 1978). In *Marrapese v. State of R. I.*, 500 F. Supp. 1207 (D. R.I. 1980), it was held a state can be a "person" under the broad scope of § 1983 if it waives its 11th Amendment immunity. Other cases have attempted to limit the *Quern* holding. For example, in *Hodges v. Tomberlin*, 510 F. Supp. 1280 (S.D. Ga. 1980), the court implied that if the claim for relief was injunctive rather than monetary, the state and its agencies would be considered "persons" under § 1983. In *Thompson v. State of N.Y.*, 487 F. Supp. 212 (N.D. N.Y. 1979), it was suggested the *Quern* analysis was wrong and § 1983 was intended to override state immunity under the 11th Amendment. Finally, in *Morrow v. Sudler*, 502 F. Supp. 1200 (D. Colo. 1980), the court held the Colorado Historical Society, a state agency, was a person under § 1983.

We think the sounder view in a case such as this, where prospective injunctive relief is sought, is that a state agency should be considered a "person" under the statute. Most of the cases denying suit against the state or its agencies under § 1983 have done so under the 11th Amendment, which prohibits suits against the states in federal court absent consent. The 11th Amendment is not applicable to this case since the action is brought in state court. Further, a careful reading of *Quern* reveals that case did not hold states or state agencies could never be considered "persons" under § 1983. In fact, Justice Rehnquist's majority opinion carefully skirted the issue. We conclude under the facts of this case the Kansas State Board of Pharmacy is a "person" as contemplated in § 1983.

Once suit is allowed against the state, attorney fees can be properly awarded out of state funds. *Hutto v. Finney*, 437 U.S. 678, 57 L.Ed.2d 522, 98 S.Ct. 2565 (1978), *reh. denied* 439 U.S. 1122 (1979).

Appellee next argues two procedural defects require this court to deny appellant's motion. First, it is contended a plaintiff must specifically allege a violation of § 1983 to obtain attorney fees under § 1988. Here, Dr. Gumbhir alleged the appellee's denial of his application violated his rights under the 1st, 5th, and 14th

Amendments and Article 1, § 8 of the U.S. Constitution. § 1983 was never mentioned. Several courts have confronted this issue.

In *Harradine v. Supervisors*, 73 App. Div. 2d 118, 425 N.Y.S.2d 182 (1980), the court allowed recovery of attorney fees even though a violation of § 1983 had not been specifically alleged, stating:

"In view of the number of apportionment cases brought in Federal court pursuant to section 1983, the similarity in language of section 1983 and section 1 of article 1 of the New York State Constitution, the policy behind section 1988 which is to encourage the private citizen to take action as a 'private attorney general', and the fact this action is premised upon a constitutional claim, we conclude that attorney's fees may be recovered in this context pursuant to section 1988 in a State court. Plaintiff's cause of action is embraced within the spirit of section 1983 . . . ." p. 126.

The Alaska Supreme Court has also examined the problem. In *Fairbanks Correctional Center v. Williamson*, 600 P.2d 743 (Alaska 1979), the sole mention of § 1983 was in parenthesis in the title of the complaint. Nevertheless, the court held § 1988 applied, stating that a combination of "the broad purposes of 42 U.S.C. § 1983—to provide a cause of action upon allegations of facts constituting deprivation under color of state authority of federal constitutional rights with the liberal pleading provisions of Alaska Rule of Civil Procedure 8" allowed the complaint to state a cause of action under § 1983. 600 P.2d at 747.

The Wisconsin Supreme Court in *Boldt*, 101 Wis. 2d at 584, held a complaint alleging "a violation of the due process clauses of the Wisconsin and United States Constitutions," was sufficient to state a cause of action under § 1983 because of that statute's reference to "the deprivation of any rights, privileges, or immunities secured by the Constitution."

Based on the foregoing decisions and Kansas' liberal rules of notice pleading (K.S.A. 60-102), we hold appellant has adequately pleaded a violation of his civil rights under § 1983 to maintain a suit for attorney fees under § 1988, even though the better practice is to specifically plead a violation of § 1983.

It is also argued Gumbhir's request for attorney fees must be denied because he failed to plead 42 U.S.C. § 1988 in his original pleadings. In *White v. New Hampshire Dept. of Empl. Sec.*, 455 U.S. _____, 71 L.Ed.2d 325, 102 S.Ct. 1162 (1982), the U.S. Supreme Court spoke to this claim in a unanimous opinion. The issue in the case arose from a post-judgment request for an award

of attorney fees under § 1988 growing out of class action litigation where White claimed respondent failed to make timely determination of entitlements of unemployment compensation. His complaint did not request attorney fees. The trial court granted White's claim. Pending the appeal the parties settled the case by agreement. Four and one-half months after entry of final judgment White filed a motion for attorney fees. The trial court awarded the requested fees over objection of respondent who claimed surprise. The Court of Appeals reversed the trial court, holding petitioner's post-judgment motion for attorney fees constituted a motion to alter or amend a judgment and was governed by the ten-day time limit.

The case came to the Supreme Court in that condition. The court reversed the Court of Appeals, stating:

"Section 1988 provides for awards of attorney's fees only to a 'prevailing party.' Regardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has 'prevailed.' Nor can attorney's fees fairly be characterized as an element of 'relief' indistinguishable from other elements. Unlike other judicial relief, the attorney's fees allowed under § 1988 are not compensation for the injury giving rise to an action. Their award is uniquely separable from the cause of action to be proved at trial.

. . . .

"Section 1988 authorizes the award of attorney's fees 'in [the] discretion' of the court. We believe that this discretion will support a denial of fees in cases in which a post-judgment motion unfairly surprises or prejudices the affected party. Moreover, the district courts remain free to adopt local rules establishing timeliness standards for the filing of claims for attorney's fees." p. ———

We conclude Gumbhir's motion for attorney fees was timely filed. To avoid future confusion, however, we hereby adopt the rule that motions for attorney fees under 42 U.S.C. § 1988 must be filed no later than thirty days after the entry of final judgment, thus facilitating the determination of all issues in one appeal.

To obtain attorney fees under § 1988 the litigant must be the "prevailing party" in his action to enforce § 1983. Appellees argue Dr. Gumbhir is not a prevailing party because this court's decision was based solely on a Kansas constitutional issue.

In *Maher v. Gagne*, 448 U.S. 122, 65 L.Ed.2d 653, 100 S.Ct. 2570 (1980), plaintiff brought an action alleging Connecticut's Aid to Families with Dependent Children (AFDC) regulation violated the Social Security Act and the Equal Protection and Due Process Clauses of the 14th Amendment. Ultimately the case

was settled and the district court entered a consent decree. Defendant then challenged the award of attorney fees to plaintiff. The Supreme Court upheld the award stating:

"We also find no merit in petitioner's suggestion that respondent was not the 'prevailing party' within the meaning of § 1988. The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees. Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that 'for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.' " 448 U.S. at 129.

Lower courts have fashioned more specific definitions of "prevailing party" for § 1988 purposes. In *Nadeau v. Helgemoe*, 581 F.2d 275, 279 (1st Cir. 1978), the court held plaintiffs can be considered prevailing parties if they succeed on any significant issue in litigation which achieves some benefit the parties sought in bringing suit, but the amount of the fees should be based only on work performed on issues in which they were successful. See also *Draper v. Town Clerk of Greenfield*, _____ Mass. _____, 425 N.E.2d 333 (1981). The Third Circuit Court of Appeals has stated the test of whether a person is a prevailing party is whether he "essentially succeeds in obtaining the relief he seeks in his claims on the merits." *Morrison v. Ayoob*, 627 F.2d 669, 671 (3rd Cir. 1980), *cert. denied* 449 U.S. 1102 (1981). In *Williams v. Alioto*, 625 F.2d 845, 847 (9th Cir. 1980), the 9th Circuit Court of Appeals held plaintiffs who had won a preliminary injunction were prevailing parties because they had "succeeded on a 'significant issue in litigation which achieve[d] . . . the benefit the parties sought in bringing suit.' *Sethy v. Alameda County Water District*, 602 F.2d 894, 897-98 (9th Cir. 1979), *cert. denied* 444 U.S. 1046 . . . (1980)."

Here Dr. Gumbhir succeeded in getting the State Board of Pharmacy to register him. That is precisely what he set out to do. Under any of the above theories he is clearly a "prevailing party" even though his victory was based on the merits of his state constitutional claim and not a § 1983 action. See *Seals v. Quarterly County Court, Etc.*, 562 F.2d 390 (6th Cir. 1977), where plaintiffs were awarded attorney fees when they prevailed only on their state law claim. There, however, the state claim involved a common nucleus of operative facts with a substantial federal

claim. We hold Gumbhir is a "prevailing party" for § 1988 purposes, subject to a showing his claim complied with the *Seals* rule, which will be discussed later.

Appellees argue in order to reverse the trial court's denial of attorney fees this court would have to find an abuse of discretion. Even though § 1988 states the award of attorney fees is within the sound discretion of the trial court, the legislative history and case law interpreting the act clearly indicate attorney fees are to be awarded to the prevailing plaintiff in § 1983 actions unless there are special circumstances making such award unjust. *Busche v. Burkee*, 649 F.2d 509 (7th Cir. 1981); *Johnson v. Nordstrom-Larpenteur Agcy., Inc.*, 623 F.2d 1279 (8th Cir.), *cert. denied* 449 U.S. 1042 (1980); *Love v. Mayor, City of Cheyenne, Wyo.*, 620 F.2d 235, 236 (10th Cir. 1980); *Miller v. City of Mission, Kan.*, 516 F. Supp. 1333, 1338 (D. Kan. 1981). Of special significance to the instant case is *Riddell v. National Democratic Party*, 624 F.2d 539, 545 (5th Cir. 1980), where the court held the fact that defendant state officials enforced an invalid statute in good faith compliance with their official duties does not constitute special circumstances to deny attorney fees.

Since Gumbhir prevailed under a Kansas constitutional issue which properly prevented a ruling on the federal constitutional issues, we must now re-examine the case to ascertain if the State's action involved a common nucleus of operative facts with a substantial federal claim constituting a deprivation of Gumbhir's federal rights, privileges and immunities. Let us examine the conduct complained of in light of the two requisite elements for recovery under 42 U.S.C. § 1983.

The conduct complained of must have been by some person acting under color of law. Since we previously held "person" includes governmental agencies, it is clear the denial of Ashok Gumbhir's application to take the pharmacy examination for admission under authority of K.S.A. 1979 Supp. 65-1631(a) came squarely within the first requisite.

To come under 42 U.S.C. § 1983, such conduct must have also subjected the complainant to the deprivation of rights, privileges or immunities secured to him by the Constitution and laws of the United States.

This requisite presents a more difficult question. Appellant argues the mere *allegation of a substantial claim* of deprivation of

rights, privileges and immunities secured by the Constitution and laws of the United States is sufficient to trigger the fee shifting mechanism of 42 U.S.C. § 1988, citing *Maher v. Gagne*, 448 U.S. 122, and *Hagans v. Lavine*, 415 U.S. 528, 39 L.Ed.2d 577, 94 S.Ct. 1372 (1974). In both foregoing cases the "substantial claim" statement pertains to the nature of the pleadings required to invoke jurisdiction of federal courts under 42 U.S.C. § 1343. That issue is obviously absent here. We are convinced § 1988 is applicable only in instances where the conduct complained of is an actual deprivation of federal rights, privileges and immunities. Let us now examine appellant's complaint of a federal deprivation. The conduct at issue is the State Board's denial of Gumbhir's right to take the pharmacy examination. Dr. Gumbhir attacked K.S.A. 1979 Supp. 65-1631 under the 5th and 14th Amendment guarantees of Due Process and Equal Protection on the following theories which we will address in order. 1) The statute is unconstitutionally vague; 2) the statute creates an unreasonable classification; 3) the classification is based on the suspect trait of alienage; 4) the appellant was denied a liberty interest to practice his chosen profession; 5) the statute creates an unauthorized delegation of legislative authority.

Is K.S.A. 1979 Supp. 65-1631 unconstitutionally vague? The standard for determining whether a statute is unconstitutional for vagueness is a common-sense determination of fairness. Can an ordinary person exercising ordinary common sense understand and comply with the statute? If so, it is not unconstitutionally vague. *Harris v. McRae*, 448 U.S. 297, 311 n. 17, 65 L.Ed.2d 784, 100 S.Ct. 2671, *reh. denied* 448 U.S. 917 (1980); *CSC v. Letter Carriers*, 413 U.S. 548, 37 L.Ed.2d 796, 93 S.Ct. 2880 (1973).

Statutes which regulate the practice of a profession must be reasonable and advise registrants of the requirements imposed by law. *Morey v. Doud*, 354 U.S. 457, 1 L.Ed.2d 1485, 77 S.Ct. 1344 (1957). K.S.A. 1979 Supp. 65-1631 meets all of the above standards. We hold it is not unconstitutionally vague.

It is unquestioned that the State has a legitimate interest in assuring the public a cadre of competent pharmacists. In furtherance of the state objective, the statute in question creates two classes: a) those who receive undergraduate or first professional degrees from a school or college of pharmacy accredited by the American Council of Pharmaceutical Education (ACOPE) or a

department of a university accredited by ACOPE; and b) all others.

The test of whether the classification offends the Equal Protection Clause involves a consideration of whether the state objective U.S. 420, 425-26, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961):

"The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Moreover, the statute in question is clothed with a presumption of constitutionality. Such being the case, the burden of proof as to the invalidity of the statute falls on the one attacking the statute. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 55 L.Ed.2d 369, 31 S.Ct. 337 (1911); *Henry v. Bauder*, 213 Kan. 751, 518 P.2d 362 (1974).

The fact that such classification creates a potential inequity does not offend the 14th Amendment of the United States Constitution. See *Dandridge v. Williams*, 397 U.S. 471, 25 L.Ed.2d 491, 90 S.Ct. 1153, *reh. denied* 398 U.S. 914 (1970).

Hence, the paramount issue is whether the requirement of K.S.A. 1979 Supp. 65-1631 concerning accreditation is rationally based on the state interest in insuring the fitness and capacity of those who practice pharmacy in the State of Kansas. The State of Kansas has the general authority to prescribe qualifications for licensure of pharmacists in the state. There is no question that the state interest in developing a field of well-qualified pharmacists is a legitimate one.

"[T]he States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety and other valid interests they have a broad power to establish standards for licensing practitioners . . . ." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792, 44 L.Ed.2d 572, 95 S.Ct. 2004 (1975).

The fact that filling of prescriptions and dispensing of dangerous drugs has such an obvious and direct impact on the public health hardly needs to be mentioned. This important state interest gives the Kansas Legislature a wide range of discretion in classifying applicants for registration as pharmacists to assure that those who are licensed are highly qualified to practice.

The accreditation requirement contained in K.S.A. 1979 Supp.

65-1631 is clearly designed to assure a competent field of practicing pharmacists in the State of Kansas. There is sound reason for distinguishing between graduates of accredited schools and graduates of non-accredited schools. Standards utilized in the accreditation process relate to such important qualities of education as faculty-student ratios, classroom and clinical facilities, and financial resources of the pharmacy program. The direct relationship between these factors and the quality of education offered by a particular program is difficult to dispute. That accreditation bears a direct relationship to the State's interest in providing a field of competent pharmacists is readily demonstrated by an analysis of the criteria utilized in the accreditation process.

Additionally, in both state and federal courts, educational accreditation requirements have been upheld as constitutional under the 14th Amendment. See *Lombardi v. Tauro,* 470 F.2d 798 (1st Cir. 1972), *cert. denied* 412 U.S. 919 (1973); *Kadans v. Collins,* 441 F.2d 657 (9th Cir. 1971); *Hackin v. Lockwood,* 361 F.2d 499 (9th Cir. 1966), *cert. denied* 389 U.S. 143 (1967); *Harris v. Louisiana State Supreme Court,* 334 F. Supp. 1289 (E.D. La. 1971); *In re Stephenson,* 511 P.2d 136 (Alaska 1973); *Application of Schatz,* 80 Wash. 2d 604, 497 P.2d 153 (1972); *In re Eisenson,* 272 So. 2d 486 (Fla. 1973), *Henington v. State Board of Bar Examiners,* 60 N.M. 393, 291 P.2d 1108 (1956). The majority of these cases involve the requirement that a bar applicant must be a graduate of a law school approved by the American Bar Association and all cases upheld the requirement as constitutional.

In *In re Application of Bryan M. Hansen,* 275 N.W.2d 790 (Minn. 1978), the plaintiff attacked Minnesota's rule requiring proof of graduation from an ABA-approved law school as a prerequisite to sitting for the bar examination as being unconstitutional in violation of the Due Process and Equal Protection clauses of the 14th Amendment. Here the Court noted that although the applicant may have a strong interest in being able to practice law, the state can regulate admission as long as such regulation is reasonably related to the state's interest in a competent bar. The court noted that a procedure is reasonable as long as it is not arbitrary and capricious. The Minnesota Court also concluded that the ABA is best equipped to perform the function of accrediting law schools. 275 N.W.2d at 794. The Minnesota

Court found that there is no violation of the Equal Protection Clause since classifications will be upheld as long as they are reasonably related to some legitimate governmental purpose. 275 N.W.2d at 796. The Court concluded that the distinction between graduates of accredited and non-accredited law schools is reasonably related to insuring a competent bar. Analogously, the distinction between graduates of accredited and non-accredited pharmacy schools is rationally related to insuring a competent field of practicing pharmacists.

Appellant argues the classification created by K.S.A. 1979 Supp. 65-1631 is based on the suspect trait of alienage and hence requires the courts to closely scrutinize the reasonableness of such classification. Cases involving "suspect classifications" or "fundamental interests" force the courts to peel away the protective presumption of constitutionality and adopt an attitude of active and critical analysis, thus subjecting the classification to strict scrutiny. The effect is to shift the burden of proof to justify the classification from the individual attacking such classification to the State or its agencies. *Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969). See also *Graham v. Richardson*, 403 U.S. 365, 29 L.Ed.2d 534, 91 S.Ct. 1848 (1971).

Contrary to the argument above, K.S.A. 1979 Supp. 65-1631 creates a classification based on education; there is no requirement which addresses citizenship or alienage. The statute, in fact, classifies on the basis of education and distinguishes between applicants whose education has met the standards and those whose education has not met the standards. Consequently, reliance on the case of *Wong v. Hohnstrom*, 405 F. Supp. 727 (D. Minn. 1975), is misplaced. In that case, the plaintiff was an alien who was denied application or registration solely for the reason that the statute in question explicitly referred to alienage for its turning point. In the case at bar, however, Gumbhir was denied application for registration solely because he had failed to meet the explicit educational requirements set forth in the statute. We hold the denial of appellant's application was not based on alienage and his equal protection argument is gauged by the rational relation test.

Appellant further argues that because he was unable to practice his chosen profession in the State of Kansas he was being denied a liberty interest under the Due Process and Equal Protection

clauses of the United States Constitution. Contrary to appellant's assertion that he has a constitutionally secured right to practice his profession, numerous cases have recognized that there is no fundamental interest involved in the practice of medicine (*Shaw v. Hospital Authority of Cobb County*, 507 F.2d 615 [5th Cir. 1975]; *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399, *cert. denied* 431 U.S. 914 [1976]), or in any other profession. *Naismith Dental Corp. v. Board of Dental Examiners*, 68 Cal. 3d 253, 137 Cal. Rptr. 133 (1977). Analogously, the practice of pharmacy is not a fundamental interest explicitly or implicitly guaranteed by the Constitution.

The appellant concedes that the Kansas State Board of Pharmacy is authorized to set forth requirements for licensure and registration of pharmacists. The provisions of K.S.A. 1979 Supp. 65-1631 bear a rational relationship to the state interest in protecting the health and welfare of its citizens by assuring competent practicing pharmacists and the statute therefore is able to withstand the attack that it does not provide equal protection.

Appellant has presented no personal interests which outweigh the important, substantive and administrative interests which Kansas has in the enforcement of K.S.A. 1979 Supp. 65-1631. The interests which appellant does assert are not based on constitutional guarantees, but upon his preference in pharmacy education and Kansas' failure to conform or defer to that preference and its own constitution. We hold appellant's liberty interest guaranteed under the U.S. Constitution was not unconstitutionally denied.

Finally, appellant contends the unauthorized delegation of legislative authority found herein to violate the Kansas Constitution is also a violation of the Constitution of the United States. We disagree. This case pertains to a state statute providing for the licensing of pharmacists by a state administrative body; a function of the state. Justice Cardozo, speaking for the U.S. Supreme Court, in *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612, 81 L.Ed. 835, 57 S.Ct. 549 (1937) states:

"The argument . . . is that in this there was a grant of discretionary power overpassing the limits of lawful discretion.

"The Constitution of the United States . . . has no voice upon the subject. The statute challenged as invalid is one adopted by a state. This removes objections that might be worthy of consideration if we were dealing with an act of Congress. How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."

E.g., Lombardi v. Tauro, 470 F.2d 798; *Parcell v. State of Kan.*, 468 F. Supp. 1274, 1277 (D. Kan. 1979); *Rite Aid Corp. v. Bd. of Pharmacy of State of N.J.*, 421 F. Supp. 1161, 1178 (D. N.J. 1976).

We therefore conclude the state claim upon which Gumbhir prevailed below did not involve a common nucleus of operative facts with a substantial federal claim because the Kansas State Board of Pharmacy did not subject Gumbhir to a deprivation of rights, privileges or immunities secured to him by the Constitution and laws of the United States. Thus, Gumbhir is not a prevailing party as required since there was no 42 U.S.C. § 1983 violation upon which a civil rights attorney fee claim could be based.

The judgment of the trial court is affirmed.

HOLMES and MCFARLAND, JJ., concur in the result.

APPENDIX B

No. 51,935

ASHOK K. GUMBHIR, *Appellant*, v. KANSAS STATE BOARD OF PHARMACY, *Appellee*.

(618 P.2d 837)

SYLLABUS BY THE COURT

1. LEGISLATURE—*Constitutional Mandate.* Under Article 2, Section 1 of the Constitution of the State of Kansas the legislative power of this state shall be vested in a house of representatives and senate.
2. KANSAS CONSTITUTION—*Legislation—Delegation of Power.* An unlawful delegation of legislative power is contrary to the public policy expressed in the Constitution.
3. LEGISLATURE—*Authority—Delegation of Authority to State Agencies.* The legislature may enact general provisions for regulation and grant to *state agencies* certain discretion in filling in the details, provided it fixes reasonable and definite standards to govern the exercise of such authority.
4. SAME—*Authority—Delegation of Authority to Nongovernmental Agencies Prohibited.* The legislative power of this state is vested in the legislature and the legislature is prohibited from delegating legislative powers to *nongovernmental associations or groups.*
5. PUBLIC HEALTH—*Pharmacists—Educational Qualifications—Restrictions in Statute Unconstitutional.* The provision in K.S.A. 1979 Supp. 65-1631(*a*) which restricts approval of the necessary educational qualifications for examination and registration of pharmacists in this state to those individuals who have graduated from schools of pharmacy accredited by the American Council on Pharmaceutical Education, a nongovernmental agency, is constitutionally impermissible.
6. SAME—*Pharmacists—Legislative Delegation of Authority to Regulate Granted to Nongovernmental Agency—Statute Unconstitutional.* The provision of the statute referred to above constitutes an unlawful delegation of legislative authority to a nongovernmental association and is constitutionally impermissible under Article 2, Section 1 of the Constitution of the State of Kansas.
7. STATUTES—*Constitutionality—Legislative Intent to Retain Act Even if Portion Later Declared Unconstitutional.* A legislative intention to uphold and retain a part of a legislative act, if a portion thereof is held to be unconstitutional and void, should be upheld when it appears the remaining portion of the act would have been enacted had such unconstitutional or invalid provisions not been included.

Appeal from Johnson district court, division No. 1, HERBERT W. WALTON, judge. Opinion filed November 1, 1980. Reversed and remanded with directions.

J. Nick Badgerow, of McAnany, Van Cleave & Phillips, P.A., of Kansas City, argued the cause and was on the brief for the appellant.

Robert E. Davis, of Davis, Davis, McGuire & Thompson, Chartered, of Leavenworth, argued the cause, and *John F. Thompson*, of the same firm, was with him on the brief for the appellee.

The opinion of the court was delivered by

FROMME, J.: This is an appeal from an order of a district court

upholding the action of the Kansas State Board of Pharmacy (the Board) in refusing to permit Ashok K. Gumbhir either to take the examination for registration as a pharmacist or to be admitted by reciprocity. The claim of Mr. Gumbhir is that a certain provision in the pharmacist registration statute, K.S.A. 1979 Supp. 65-1631, is constitutionally impermissible. The Board interprets the statute so as to permit no one to take the examination for registration as a pharmacist or to be admitted by reciprocity if such person does not have an undergraduate degree from a school in the United States accredited by the American Council on Pharmaceutical Education (ACOPE). ACOPE is a nongovernmental agency organized exclusively for educational and other nonprofit purposes. This nongovernmental agency attempts to approve and accredit only schools of pharmacy located in the United States. No pharmacist who has obtained his or her undergraduate degree from a school outside the United States can hope to become a registered pharmacist in the State of Kansas under the Board's interpretation of this statute.

The facts leading to the present appeal were stipulated by the parties. Mr. Gumbhir manages and is part owner of a pharmacy in Overland Park, Johnson County, Kansas. He is a citizen of the United States and a resident of the State of Missouri. He graduated and received a bachelor's degree in pharmacy from Punjab University in Chandrigarh, India, in 1960.

The plaintiff on coming to the United States graduated and received a master of science degree in pharmacy from the University of Minnesota in 1968. The undergraduate pharmaceutical program of the University of Minnesota is, and was at all times relevant, accredited by ACOPE and is recognized and approved by the Board, but not its graduate program.

The plaintiff graduated and received a Ph.D. degree in pharmacy administration from Ohio State University in 1971. The undergraduate program of Ohio State University is and was at all times relevant accredited by ACOPE and recognized and approved by the Board, but not its graduate program. ACOPE does not approve any graduate programs.

The plaintiff was registered as a licensed pharmacist in the State of Ohio by examination in 1970, and presently holds a license to practice pharmacy in the State of Ohio. He was regis-

tered as a pharmacist in the State of Missouri by reciprocity in 1974, and holds a license to practice pharmacy in the State of Missouri.

The plaintiff applied for registration in the State of Kansas by examination, by submitting the required application and fee in accordance with K.S.A. 1979 Supp. 65-1631(*b*). The plaintiff also applied for registration in Kansas by reciprocity by submitting the required application and fee in accordance with K.S.A. 1979 Supp. 65-1631(*d*)(*g*) based on prior registrations in both Ohio and Missouri.

The Board denied both applications for registration on the basis the statute, K.S.A. 1979 Supp. 65-1631, requires every applicant in Kansas to be a graduate of a college accredited by ACOPE. ACOPE accredits only undergraduate schools in the United States. Punjab University is not in the United States. Plaintiff filed this action in the district court after all administrative remedies had been exhausted and all prerequisites to the jurisdiction of that court had been fulfilled.

The statute regulating the registration of pharmacists, K.S.A. 1979 Supp. 65-1631, in pertinent part provides:

"(*a*) It shall be unlawful for any person to practice as a pharmacist in this state, unless such person is registered by the board as a pharmacist. *Every applicant* for examination and registration as a pharmacist *shall be* of good moral character and temperate habits, *a graduate of a school or college of pharmacy or department of a university accredited by the American council on pharmaceutical education* and recognized and approved by the board, and shall file proof satisfactory to the board, substantiated by proper affidavits, of a minimum of one year of pharmaceutical experience, acceptable to the board, under the supervision of a registered pharmacist and shall pass an examination by the board. Pharmaceutical experience as required in this section shall be under the supervision of a registered pharmacist and shall be predominantly related to the dispensing of prescription medication, compounding prescriptions, preparing pharmaceutical preparations, and keeping records and making reports required under the state and federal statutes." Emphasis supplied.

The portions of the statute which relate to applications for registration on both examination and on reciprocity require, as a condition precedent to taking the examination or to receiving registration by reciprocity, that the applicant have the required education prescribed in subsection (*a*), *i.e.*, graduation from a school or pharmacy accredited by ACOPE.

The primary attack launched against the constitutionality of this statute is based upon the claim that 65-1631(*a*) of the Kansas

Pharmacy Act constitutes an unlawful delegation of legislative authority to a nongovernmental agency, ACOPE, which delegation is impermissible under the Constitution of the State of Kansas.

Article 2, Section 1 of the Constitution of the State of Kansas provides:

"The legislative power of this state shall be vested in a house of representatives and senate."

This constitutional provision prevents usurpation of legislative authority by other departments of government as well as by a nongovernmental agency or a private individual. The authority to make obligatory rules and provide penalties for breach of said rules belongs to the legislature. An unlawful delegation of legislative power is contrary to the public policy expressed in the Constitution. *State v. Crawford,* 104 Kan. 141, 177 Pac. 360, 2 A.L.R. 880 (1919).

The *Crawford* case dealt with a statute which provided that all electrical wiring shall be in accordance with the national electric code. The court found the code could be changed sporadically by the National Fire Protective Association which met only occasionally, and even then might meet anywhere in North America. It was held the statute was constitutionally impermissible as amounting to an unlawful delegation of legislative power to the National Fire Protective Association, a nongovernmental association. The *Crawford* court stated:

"If the legislature desires to adopt a rule of the national electrical code as a law of this state, it should copy that rule and give it a title and an enacting clause and pass it through the senate and the house of representatives by a constitutional majority and give the governor a chance to approve or veto it, and then hand it over to the secretary of state for publication." 104 Kan. at 144.

In *Quality Oil Co. v. duPont & Co.,* 182 Kan. 488, 322 P.2d 731 (1958), the court dealt with a fair trade statute. The statute authorized a trademark owner and a retailer to agree upon a price for an article which was then to be binding between not only the parties agreeing but also any other persons who later were notified of said price. The court held this statute to be an unconstitutional delegation of legislative power, saying that the power to fix rates or prices upon all citizens is a legislative power and the legislature may not abdicate its function and delegate its legislative powers to others.

In *State, ex rel., v. Mermis*, 187 Kan. 611, 358 P.2d 936 (1961), it is pointed out that legislative authority in limited cases may be delegated to *governmental agencies* if, and only if, adequate guidelines are set out in the statute to clearly limit and define the conditions and the nature of the authority to be exercised. In *Mermis* a statute which delegated to the director of alcoholic beverage control the authority and discretion to set minimum prices of intoxicating liquors to be sold in Kansas, without providing guidelines, was held to be an unlawful delegation of legislative authority. The decision was based upon *Crawford* and *Quality Oil*.

The case of *Poe v. Menghini*, 339 F. Supp. 986 (D. Kan. 1972), dealt with delegation of authority to the Joint Commission on Accreditation of Hospitals so the commission might determine what hospitals could perform abortions. The opinion of Judge Theis contains some very appropriate language which bears upon our present case:

"This provision suffers from a second constitutional defect. The JCAH is a private, non-profit corporation with headquarters outside the State of Kansas. To this private concern the Kansas Legislature has delegated the power to promulgate standards binding on Kansas hospitals, at least if therapeutic abortions are to be performed in their facilities. In the event an unaccredited hospital, such as the Douglass Hospital, lends its facilities to the performance of therapeutic abortions, it may be subject to criminal prosecution. Many years ago, the Kansas Supreme Court defined the following limitation on the legislative power:

" 'The legislature cannot delegate to private individuals and private associations the power to make obligatory rules concerning the management and care of property, nor can it provide that the breach of such rules shall be a penal offense. Kansas v. Crawford, 104 Kan. 141, 177 P. 360 (1919).'

"This rule is compatible with present federal constitutional law. Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1935). In this case, the Kansas Legislature has acted in apparent disregard of this constitutional limitation on their powers of delegation. And particularly since the result of this delegation has been the infringement of a fundamental right, the delegation violates the Due Process Clause of the Fourteenth Amendment." 339 F. Supp. at 994, 995.

In *State, ex rel., v. Gleason*, 148 Kan. 1, 79 P.2d 911 (1938), a question was raised as to the constitutionality of a provision of the Osteopathic Practice Act of Kansas. The act provided that educational requirements for an osteopath applying for examination and registration should include graduation from an osteopathic school or college of good repute. The definition of such a college was contained in the statute and required it to be a college in which the requirements for graduation "shall be in no partic-

ular less than those prescribed by the American Osteopathic Association." See G.S. 1935, 65-1202. The court in *Gleason* held there was no unlawful delegation of legislative authority. The standards of the American Osteopathic Association mentioned in the statute were merely used as a guideline or standard to be used by the state board and the delegation of authority was to the state board, not to the American Osteopathic Association.

In *Sutherland* v. *Ferguson*, 194 Kan. 35, 397 P.2d 335 (1964), the healing arts statute came under constitutional attack by the chiropractors who claimed it failed to lay down guidelines and standards. G.S. 1961 Supp. 65-2825 required the board to prepare and keep up to date a list of accredited healing arts schools. The accreditation was placed in the hands of the State Board of Healing Arts. There was no claim that the board abdicated its accreditation responsibilities to some other nongovernmental association or group. G.S. 1961 Supp. 65-2876 defined an accredited school of chiropractic to "be a legally incorporated school teaching chiropractic which the board shall determine to have a standard not below that of the national college of chiropractic of Chicago" and all such schools had to be approved first by the board before a graduate could take the examination. Again this court held there was no impermissible delegation of legislative power. The National College of Chiropractic of Chicago was merely used as a guide or standard to be followed by the state board.

The appellant, Mr. Gumbhir, cites additional cases from other states in which the courts have examined similar statutes. In those cases the legislatures have delegated some discretion and authority to state boards. The cases follow the general trend of the Kansas cases. Several cases rely on our early case of *State* v. *Crawford*, 104 Kan. 141. After reviewing these cases it appears the legislature may enact general provisions for regulation and grant to *state agencies* certain discretion in filling in the details, provided it fixes reasonable and definite standards to govern the exercise of such authority. *State, ex rel.*, v. *Urban Renewal Agency of Kansas City*, 179 Kan. 435, 440, 296 P.2d 656 (1956); *State ex rel. Schneider* v. *City of Topeka*, 227 Kan. 115, 125, 605 P.2d 556 (1980).

However, a strict rule is applied when the delegation of authority to some outside, nongovernmental agency is attempted.

The legislative power of this state is vested in the legislature and the legislature is prohibited from delegating legislative powers to *nongovernmental associations or groups. State v. Crawford,* 104 Kan. 141; see also *Coffman v. State Bd. of Examiners,* 331 Mich. 582, 50 N.W.2d 322 (1951); *Murtha v. Monaghan,* 7 Misc. 2d 568, 169 N.Y.S.2d 137, *aff'd* 5 App. Div. 2d 695, 169 N.Y.S.2d 1010 (1957); *Gold v. S. C. Bd. of Chiropractic Exam.,* 271 S.C. 74, 245 S.E.2d 117 (1978).

The Board does not attempt to distinguish the cases relied on by Mr. Gumbhir, except for the *Poe* case. The Board cites and relies on a myriad of cases from other jurisdictions in which the courts have quite uniformly rejected the unlawful delegation argument in cases where the admission of lawyers to practice law may have been limited to those graduating from law schools accredited by the American Bar Association. However, the cases relate to limitations imposed by the courts, not by the legislatures. Some of these states have requirements similar to that of Kansas for the basic qualifications for applicants for admission to practice. Rule 704 of the Rules of the Supreme Court provides:

"[E]ach applicant shall satisfy the Admissions Board that he has completed a full course of study in both an accredited college and an accredited law school and that he has been granted and holds a baccalaureate degree and a Bachelor of Laws or Juris Doctor degree or their equivalent or higher degrees. . . . The standard for determining sufficiency of any educational requirement, or of courses of study leading to the granting of degrees above mentioned, shall be that fixed and recognized by the University of Kansas." 225 Kan. cxl, cxli.

Therefore in Kansas, what is an accredited college or law school depends on a standard, the University of Kansas, and the final determination as to required educational requirements is left to the board of admissions, which is an arm of the court. The cases involving the admission of attorneys are not too persuasive on the question of unlawful delegation of legislative authority, for the licensing and the control of attorneys are not based upon legislative authority. The licensing and control of attorneys, traditionally, has been recognized and exercised as an inherent power of the courts in the administration of justice. The judicial article of the Constitution of the State of Kansas, Article 3, Section 1, places the judicial power of this state in one court of justice; and the Supreme Court is given administrative authority over all courts in this state. The inherent power of the Supreme Court in licensing and controlling attorneys was recognized by

the legislature in K.S.A. 7-103 where it is stated this court may make such rules as it may deem necessary for the examination of applicants for admission to the bar of this state and for discipline and disbarment of attorneys.

Many of the cases relating to the licensing requirements for attorneys are in states which follow similar rules to those adopted in Kansas. In Kansas a certain educational standard is set forth as a guideline for use by the board of admissions. This would not be an unlawful or unreasonable delegation when it is placed in the hands of a board appointed by the court which has and retains the primary authority.

By way of comparison of the educational qualifications required of applicants for registration and certification as a pharmacist and those requirements for licensing by the Board of Healing Arts, we note that the statute, K.S.A. 1979 Supp. 65-2865, authorizes the Board of Healing Arts to promulgate all necessary regulations to be filed with the revisor of statutes. The rules and regulations adopted by the board which have the effect of law include K.A.R. 1980 Supp. 100-6-2. This regulation requires an applicant for license to be "[a] graduate of an approved healing arts school or college" and:

"(A) A doctor of medicine and surgery shall present proof to the board that he or she has completed a postgraduate training or residency training program of not less than one (1) year's duration *approved by the council of education of the American medical association or its equivalent* in the year in which he or she took such training or present proof that he or she has completed two (2) year's employment under a fellowship license." Emphasis supplied.

We note a standard is used of the council of education of the American medical association or its equivalent. K.A.R. 100-6-3 provides:

"The board shall prepare and keep up-to-date a list of accredited healing arts schools but no school shall be approved without the formal action of the board."

K.A.R. 1980 Supp. 100-6-5 covers applications of foreign graduates for examination and requires proof that the foreign school or college from which the applicant graduated meets the requirements set out in K.S.A. 65-2874 as follows:

"An accredited school of medicine for the purpose of this act shall be a school or college which requires the study of medicine and surgery in all of its branches, which the board shall determine to have a standard of education not below that of the university of Kansas school of medicine. All such schools shall be approved by the board."

Again we note a standard of education is set of not below that of the University of Kansas School of Medicine. The authority to approve the educational qualifications remains with the board.

Now, where does this lead us so far as K.S.A. 1979 Supp. 65-1631(*a*) is concerned? The statute which regulates registration of pharmacists requires every applicant for examination to be a graduate of a school or college of pharmacy "accredited by the American council on pharmaceutical education and recognized and approved by the board." The wording of this statute and the interpretation placed upon this provision by the Pharmacy Board has the effect of delegating to ACOPE through its accreditation process the standards of education required before registration is permitted. ACOPE is not a governmental agency. It is a private nonprofit association having full control over its own accreditation requirements. The arbitrary and unreasonable nature of its action in its accreditation process is apparent in this case. No foreign schools receive ACOPE accreditation. No graduate schools either in or out of the United States are accredited.

The provision in K.S.A. 1979 Supp. 65-1631(*a*) which restricts approval of the necessary educational qualifications for examination and registration of pharmacists in this state to those individuals who have graduated from schools of pharmacy accredited by the American Council on Pharmaceutical Education, a nongovernmental agency, is constitutionally impermissible. The Kansas State Board of Pharmacy, which has been given general authority to register pharmacists, if bound by said provision, would not have the ultimate authority. That authority would be in ACOPE, a nongovernmental association which makes its own standards for accrediting those schools whose graduates may become registered pharmacists in Kansas.

The provision of the statute referred to above constitutes an unlawful delegation of legislative authority to a nongovernmental association and is constitutionally impermissible under Article 2, Section 1 of the Constitution of the State of Kansas.

The closing provision of the State Pharmacy Act, K.S.A. 1979 Supp. 65-1649, provides:

"If any clause, sentence, paragraph, section or part of the pharmacy act of the state of Kansas or the application thereof to any person or circumstances shall for any reason be adjudged by any court of competent jurisdiction to be unconstitu-

tional or invalid, such judgment shall not affect, impair or invalidate the remainder thereof, and the application thereof to other persons or circumstances, but shall be confined in its operation to the clause, sentence or paragraph, section or part thereof involved in the controversy, in which such judgment shall have been rendered and to the person or circumstances involved. It is hereby declared to be the legislative intent that such act would have been enacted had such unconstitutional or invalid provisions not been included."

A legislative intention to uphold and retain a part of a legislative act if a portion thereof is held to be unconstitutional and void should be upheld when it appears the remaining portion of the act would have been enacted had such unconstitutional or invalid provisions not been included. *State v. Next Door Cinema Corp.*, 225 Kan. 112, Syl. ¶ 8, 587 P.2d 326 (1978); *State, ex rel., v. City of Overland Park*, 215 Kan. 700, 711, 527 P.2d 1340 (1974). Such an intention is clearly expressed. The phrase which is constitutionally impermissible as an unlawful delegation of legislative power in K.S.A. 1979 Supp. 65-1631 is "accredited by the American council on pharmaceutical education and." By striking this phrase the balance of the statute appears proper. The removal of said portion would not appear to affect, impair, or invalidate the remainder thereof. The valid portion of the statute remaining can then be read and applied as follows:

"Every applicant for examination and registration as a pharmacist shall be of good moral character and temperate habits, a graduate of a school or college of pharmacy or department of a university . . . recognized and approved by the board, and shall file proof satisfactory to the board, substantiated by proper affidavits, of a minimum of one year of pharmaceutical experience . . . ."

Having decided this portion of the statute is constitutionally impermissible because it unlawfully delegates legislative authority to a nongovernmental agency, it is not necessary for us to examine the other constitutional questions and issues raised by appellant concerning the refusal of the Board to permit examination and registration. Such questions and issues are raised merely as additional grounds for reversing the decision of the district court and of the Board.

We reverse the judgment of the district court and set aside the order of the Kansas Board of Pharmacy denying Ashok K. Gumbhir's application to take the examination for registration as a pharmacist, and denying his application to be admitted by reciprocity. The Kansas Board of Pharmacy is directed to reconsider these applications in accordance with what has been said in the foregoing opinion.

APPENDIX C

United States Constitution, Amendment I, provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX D

United States Constitution, Amendment V, provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

United States Constitution, Amendment XIV, provides as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
>
> Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a

member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in supressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX F

Kansas Constitution, Article 2, Section 1, provides as follows:

§1. Legislative power.

The legislative power of this state shall be vested in a house of representatives and senate.

APPENDIX G

42 U.S.C. §1983 provides as follows:

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX H

42 U.S.C. §1988 provides as follows:

§1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

APPENDIX I

K.S.A. 65-1631(a) provides as follows:

Registration required of pharmacists; qualifications of applicants; application; fee; rules and regulations; reciprocal registration; fee.

(a) It shall be unlawful for any person to practice as a pharmacist in this state, unless such person is registered by the board as a pharmacist. Every applicant for examination and registration as a pharmacist shall be of good moral character and temperate habits, a graduate of a school or college of pharmacy or department of a university accredited by the American council on pharmaceutical education and recognized and approved by the board, and shall file proof satisfactory to the board, substantiated by proper affidavits, of a minimum of one year of pharmaceutical experience, acceptable to the board, under the supervision of a registered pharmacist and shall pass an examination by the board. Pharmaceutical experience as required in this section shall be under the supervision of a registered pharmacist and shall be predominately related to the dispensing of prescription medication, compounding prescriptions, preparing pharmaceutical preparations, and keeping records and making reports required under the state and federal statutes.

Supreme Court, U.S.
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CLERK

No. 82-427

In the Supreme Court of the United States

October Term, 1982

ASHOK K. GUMBHIR,
Petitioner,

vs.

KANSAS STATE BOARD OF PHARMACY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF IN OPPOSITION

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ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF KANSAS

RESPONSE BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

I. THE SUPREME COURT OF THE STATE OF KANSAS ACTED PROPERLY IN RE-EXAMINING PETITIONER'S FEDERAL CONSTITUTIONAL CLAIMS IN DETERMINING WHETHER AN AWARD OF ATTORNEY'S FEES SHOULD BE GRANTED UNDER 42 U.S.C. §1988.

The issues presented in Mr. Gumbhir's Petition For Writ of Certiorari are not novel to this Court. Recently, this Court, in a unanimous opinion, held that a court's de-

cision of entitlement to fees will require an inquiry separate from the decision on the merits. That inquiry cannot even begin until one party has prevailed. *White v. New Hampshire Department of Employment Security*, 455 U.S. ....., 71 L.Ed. 2d 325, 102 S.Ct. 1162 (1982).

> "Section 1988 provides for awards for attorney's fees only to a 'prevailing party'. Regardless of when attorney's fees are requested, the court's decision on entitlement to fees will therefore require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has 'prevailed'. Nor can attorney's fees fairly be characterized as an element of 'relief' indistinguishable from other elements. Unlike other judicial relief, the attorney's fees allowed under §1988 are not compensation for the injury giving rise to an action. Their award is uniquely separable from the cause of action to be proved at trial." *White, supra.*

The *White* case culminated a firmly established trend set by the federal courts that, prior to awarding attorney's fees under §1988, a court must have sufficient exposure to the facts and laws of the case before it is able to determine if the plaintiff's civil rights have been violated. This trend had its judicial origins in the Second Circuit decision of *Nadeau v. Helgemoe*, 581 F.2d 275 (2d Cir. 1978), although the legislative history surrounding the enactment of the Civil Rights Attorney's Fees Award Act of 1976 demonstrated that Congress clearly anticipated the need for a separate determination on the constitutional issues where a party prevails on a non-fee claim.

> "To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 154 60 with a claim that does not allow attorney's fees, that plaintiff, if it

prevails on a non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees." *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973).

H.R. 94-1558, p. 7, n.14, 94 Cong., 2d Sess. (1976).

Attorney's fees were not awarded in *Nadeau, supra*, where the legal issues were still in dispute at the time the consent decree was signed and there had never been a final judicial determination of whether or not the plaintiffs had been deprived of their constitutional rights.

In 1980, the United States Supreme Court further encouraged development of the policy to independently review the federal claims when the case had been disposed of on non-fee grounds or by settlement. In *Hanrahan v. Hampton*, 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed. 2d 670 (1980), *reh. denied*, 448 U.S. 913, 101 S.Ct. 33, 65 L.Ed. 2d 1176 (1980), this Honorable Supreme Court held that attorney's fees are appropriate under 42 U.S.C. §1988 only where there has been a determination of the "substantial rights" of the parties which Congress determined was a necessary foundation for departing from the usual rule that each party was to bear the expense of his or her own attorney. In *Hanrahan*, this Court ruled that the plaintiffs were not "prevailing parties" for the purpose of an award of attorney's fees under §1988, notwithstanding the fact that they had secured reversal of a judgment entered against them. This Court refused to allow an award of attorney's fees because there had been no determination of the substantial rights of the parties under the civil rights statutes.

Finally, just this year, this Honorable Court decided that a decision of entitlement to attorney's fees under

§1988 will require an inquiry separate from any decision on the merits. Any attorney's fee award is uniquely separable from the cause of action to be proved at trial. *White, supra.* Without a judicial determination of the substantial rights of the parties the awarding of attorney fees under §1988 would be without foundation.

Petitioner's primary objection is with the Kansas Supreme Court's re-examination of petitioner's federal constitutional claims for the sole purpose of attorney's fees. Respondent contends that the Kansas Court's independent review of Gumbhir's federal constitutional claims was not only warranted under state and federal law, but was necessary for a fair and just determination of whether attorney's fees were appropriate in this instance.

In the matter now before the Court, the Petitioner did not request an award of attorney's fees until the case had been finally decided by the highest state court. (R. Vol. I, pp. 74-76). Because there was no issue of attorney's fees under 42 U.S.C. §1988 at the time the Kansas Supreme Court examined the merits and substantive issues presented in *Gumbhir (I) v. Kansas State Board of Pharmacy*, 228 Kan. 579, 618 P.2d 837 (1980), federal questions were never examined as the Kansas Supreme Court reached a result based solely on state law grounds.

Prior to the Kansas Supreme Court's final decision that attorney's fees should not be awarded, the only judicial determination of the substantial rights of the parties was made by the Johnson County District Court. In its first decision, that court determined in a well reasoned opinion that no federal claim asserted by petitioner had been abridged. (Appendix A). The Supreme Court of Kansas reversed on State law grounds without examining petitioner's federal claims. The same lower court then,

on motion for fees, determined that petitioner was not a prevailing party within the meaning of §1983. (Appendix B). Faced with two lower court determinations that no federal right of petitioner had been abridged and that petitioner was not a prevailing party within the meaning of §1983, it was incumbent upon the Kansas Supreme Court, in accord with *White, supra,* and *Hanrahan, supra,* to:

> "re-examine the case to ascertain if the State's action involved a common nucleus of operative fact with a substantial federal claim constituting a deprivation of Gumbhir's federal rights, privileges and immunities." *Gumbhir (II) v. Kansas State Board of Pharmacy,* 231 Kan. 507, 518, 646 P.2d 1078 (1981).

The Kansas Supreme Court rejected the Petitioner's argument that the *mere allegation* of a substantial claim of deprivation of rights, privileges and immunities secured by the Constitution and laws of the United States is sufficient to trigger the fee shifting mechanism of 42 U.S.C. §1988. The Kansas Supreme Court thoroughly analyzed Petitioner's complaints of federal constitutional violations, concluding that Gumbhir was not deprived of any rights under the federal Constitution and that his State claim,

> ". . . did not involve a common nucleus of operative facts with a substantial federal claim because the Kansas State Board of Pharmacy did not subject Gumbhir to a deprivation of rights, privileges or immunities secured to him by the Constitution and laws of the United States. Thus, Gumbhir is not a prevailing party as required since there was no 42 U.S.C. §1983 violation upon which a civil rights attorney fee claim could be based." 231 Kan. at 523.

II. THE STANDARD FOR DETERMINING WHETHER AN AWARD OF ATTORNEY'S FEES UNDER §1988 SHOULD BE GRANTED IS ADEQUATE AND SHOULD NOT BE CHANGED.

Congress, anticipating the need for a separate determination on the constitutional issues when a party prevails on non-fee claims, set forth the standard that is to be applied in awarding fees in such circumstances:

> "In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed. 2d 577 (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality test', see *Hagans v. Lavine, supra; United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966), attorney's fees may be allowed even thought the court declines to enter judgment for plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact'."
>
> H.R. 94-1558, 94th Cong., 2d Sess., p. 4, n.7 (1976).

Petitioner proposes that this standard merely requires an examination of the federal claims to determine if they are "wholly insubstantial", "obviously frivolous", "plainly insubstantial" or "obviously without merit". Petitioner's proposition ignores the two-pronged nature of the standard. The House Report clearly indicates that both *Hagans, supra*, and *United Mine Workers, supra*, are to be considered. There must be both a "substantial" federal claim and that claim must arise out of a "common nucleus of operative facts".

Both *Hagans, supra,* and *United Mine Workers, supra,* dealt with the issue of whether a federal district court had authority to entertain a state law claim which was pendent to the jurisdictionally conferring federal constitutional claims. Under *Siler v. Louisville and Nashville R. Co.,* 213 U.S. 175 (1909), a federal court should, faced with both claims, decide the case on statutory grounds, without reference to the Constitution. The question then, of whether federal courts could entertain state issues, given the preference for adjudication on state claims under *Siler,* was an important one. A party could utilize the federal courts by alleging federal constitutional grounds but adjudication would resolve only the pendent state law claims. Forum shopping would be possible and the preemption doctrine disregarded without some express guidelines as to when a federal court could entertain the pendent state claim.

The Supreme Court, in *United Mine Workers, supra,* 383 U.S. at 727, while holding that the district court was proper in addressing the state law claim, stated that in instances where,

> "it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed."

This Court allowed the federal court to entertain the state law claim in *United Mine Workers,* because

> "[P]endent jurisdiction, in the sense of judicial power, exists whenever there is a claim 'arising under [the] constitution', . . . and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case' . . . . The state and federal claims must derive from a common nucleus of operative fact." 383 U.S. at 725.

The "real body" of the Gumbhir case is his state claim, the federal claims being only appendages. Gumbhir prevailed solely on the state grounds that K.S.A. §65-1631 constituted an unlawful delegation of legislative authority. This action did not comprise but "one constitutional case". A decision of the state grounds did not affect, even remotely, the federal constitutional issues.

In *Hagans, supra,* 415 U.S. 528, the plaintiff challenged a provision of the New York Code of Rules and Regulations on both federal constitutional and state statutory grounds. This Honorable Court found that there was but one "single wrong" and the claims which rested on identical facts, were little more than the equivalent of different epithets to characterize the same circumstances. This Court affirmed the lower court's decision to adjudicate the state claim holding that the statutory claim was in reality, a constitutional one. Under *Hagans* and *Mine Workers'* federal courts were given the power to entertain pendent state law claims as long as the federal and state claims arose from the same nucleus of operative facts and were so inextricably interwoven that a decision on the state claim was implicitly a decision on the federal question as well.

Given the preference for adjudication of the state claim only, Congress understandably was concerned that deserving plaintiffs under §1983 would not receive attorney's fees when they prevailed solely on state, non-fee grounds. Congress made clear its intent that where both the *Hagans* and *Mine Workers* tests have been met, attorney's fees may be properly awarded. H.R. 94-1558, p. 7, n.14, 94 Cong., 2d Sess. (1976). Congress did not intend to award fees where the federal claims are insubstantial and unsupportable on the merits. *Southeast Legal Defense*

Group v. Adams, 436 F.Supp. 891 (1977). Congress intended that plaintiffs, who couple their constitutional claims with meritorious statutory claims, not be denied attorney fees when they prevail solely on state grounds, as long as the federal claims are substantial and as long as the state and federal claims are so inextricably bound so as to comprise but one constitutional case. *Seals v. Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977).

The Kansas Supreme Court re-examined petitioner's federal claims, applying the standard set forth in House Report 94-1558. The Kansas Supreme Court found that Gumbhir had not been deprived of any right, privilege or immunity protected under the U.S. Constitution and laws. The wrong upon which he prevailed was the unlawful delegation of authority by the Kansas legislature. Petitioner's federal claims were only appendages to his state claim; they did not arise out of the same nucleus of operative facts and, as held by the Kansas Supreme Court, were insubstantial and without merit.

III. PETITIONER'S STATE CLAIMS DID NOT INVOLVE A COMMON NUCLEUS OF OPERATIVE FACTS WITH A SUBSTANTIAL FEDERAL CLAIM.

Before this Honorable Court is an action wherein the state claim is separate and distinct and does not arise out of a common nucleus of operative facts with a substantial federal claim.

The federal claims challenged the constitutionality of a Kansas statute, K.S.A. §65-1631, pursuant to the Fifth and Fourteenth Amendment guarantees of due process and equal protection under the following theories: (1) the statute was unconstitutionally vague; (2) the statute created an unreasonable classification; (3) the classification

was based on the suspect trait of alienage; (4) the appellant was denied a liberty interest to practice his chosen profession; and (5) the statute created an unauthorized delegation of legislative authority.

With respect to the first claim, the Kansas Supreme Court followed the pronouncement made by this Honorable Court in *Morey v. Doud*, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed. 2d 1485 (1957), which held that statutes which regulate the practice of a profession must be reasonable and advise registrants of the requirements imposed by law. K.S.A. §65-1631 was found to meet the above standard and was held not to be unconstitutionally vague. 231 Kan. at 518.

The Kansas Supreme Court found that the statute in question created two classes: (a) those who receive undergraduate or first professional degrees from a school or college of pharmacy accredited by the American Council on Pharmaceutical Education (ACOPE) or the department of a University accredited by ACOPE; and (b) all others.

Following decisions of this Honorable Court, the Kansas Supreme Court found that the standard for determination of whether the classification offends the equal protection clause involves a consideration of whether the state objective is furthered by the classification scheme. Utilizing the "reasonable basis" test as set forth in *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1961), the Court found that the requirements of K.S.A. §65-1631 concerning the accreditation of a pharmacist is based on the state interest in insuring the fitness and capacity of those who practice pharmacy in the State of Kansas. Furthermore, the State interest in developing a field of well qualified pharmacists is a legitimate one and the fact that filling a prescription and dis-

pensing dangerous drugs has such an obvious and direct impact on the public health problem hardly needs to be mentioned. 231 Kan. at 519. These important state interests give the Kansas legislature a wide range of discretion in classifying applicants for registration as pharmacists to assure that those who are licensed are highly qualified to practice. 231 Kan. at 520.

The accreditation requirements of K.S.A. §65-1631 were directly related to the state interest of providing a field of competent pharmacists. In both state and federal courts, educational accreditation requirements have been upheld as constitutional under the Fourteenth Amendment. See *Lombardi v. Tauro*, 470 F.2d 798 (1st Cir. 1972), *cert. denied*, 412 U.S. 919 (1973); *Kadans v. Collins*, 441 F.2d 657 (9th Cir. 1971); *Hackin v. Lockwood*, 361 F.2d 499 (9th Cir. 1966), *cert. denied*, 389 U.S. 143 (1967); *Harris v. Louisiana State Supreme Court*, 334 F.Supp. 1289 (E.D. La. 1971); *In Re Stephenson*, 511 P.2d 136 (Alaska 1973).

Petitioner argues that the classification created by the Kansas statute, K.S.A. §65-1631, is based on the suspect trade of alienage. Cases involving suspect classifications or fundamental interests force the courts to peel away the protective presumption of constitutionality and adopt an attitude of active and critical analysis, thus subjecting the classification to strict scrutiny. *Gumbhir (II)*, *supra*, 231 Kan. at 521. The Kansas Supreme Court, however, found that K.S.A. §65-1631 created a classification based on education. There is no requirement in the statute which addresses citizenship or alienage.

> "The statute, in fact, classifies on the basis of education and distinguishes between applicants who education has met the standards and those who education has not met the standard." 231 Kan. at 521.

Additionally, the Kansas Supreme Court found that there is no constitutionally secured right of Petitioner to practice his chosen profession. In arriving at this conclusion, the Kansas Supreme Court relied on federal as well as state cases. *Gumbhir (II), supra,* 231 Kan. at 527.

Finally, Petitioner maintains the position that the unauthorized delegation of legislative authority which was found to be in violation of the Kansas constitution is also a violation of the Constitution of the United States. The Kansas Supreme Court disagreed. While perhaps this contention is most closely bound up with petitioner's state claim, under clear and established principles of federal constitutional law, the contention is wholly unsupportable. See *Ostroff v. New Jersey Supreme Court,* 415 F.Supp. 326 (D. N.J. 1976); *Potter v. New Jersey Supreme Court,* 403 F.Supp. 1036 (D. N.J. 1975), *aff'd,* 546 F.2d 418 (3d Cir. 1976); *Rossiter v. Colorado State Board of Bar Examiners,* No. C-4767 (D. Colo., filed August 26, 1975) (three-judge Court); *Lombardi v. Tauro,* 470 F.2d 798 (1st Cir. 1972), *cert. denied,* 412 U.S. 919 (1973); *Kadans v. Collins,* 441 F.2d 657 (9th Cir. 1971), *appeal dismissed,* 404 U.S. 1007, 92 S.Ct. 672, 30 L.Ed. 2d 656 (1972).

Highland Farms Dairy v. Agnew, 300 U.S. 608, 612, 57 S.Ct. 549, 81 L.Ed. 835 (1937) in which Justice Cardozo, speaking for the United States Supreme Court, held that.

> "The argument . . . is that in this there was a grant of discretionary power overpassing the limits of lawful discretion.
>
> The constitution of the United States . . . has no voice upon the subject. The statute challenged as invalid is one adopted by a state. This removes objections that might be worthy of consideration if we

were dealing with an act of Congress. How powers shall be distributed by a state among its governmental organs is commonly, *if not always*, a question for the state itself." (Emphasis added).

The Kansas Supreme Court, while finding the Kansas legislature's action to be in violation of the Kansas constitution, correctly held that the same action was not a violation under federal constitutional principles. This is not the type of circumstances where an award of attorney's fees would serve to further the intent and purpose of The Civil Rights Attorney's Fees Award Act of 1976. The Kansas Court denied attorney's fees based on the finding that no civil right of the Petitioner had been violated. Indeed, to award attorney's fees in this instance would be tantamount to imposing on the state of Kansas an attorney's fees award act for Kansas constitutional violations, something the Kansas legislature has chosen not to do.

IV. CONCLUSION

Because §1983 establishes a cause of action when a party has suffered a deprivation of federally secured rights, privileges or immunities under color of state law, the essential question is to what extent and in what way is an award of attorney's fees to the prevailing party related to the cause of action established by §1983. Clearly, a party that does not prevail on §1983 grounds is not to be entitled to an award of attorney's fees. The Kansas Supreme Court, utilizing principles of federal constitutional law, affirmatively decided that no federally secured right, privilege or immunities of the petition had been abridged. The decision of the Kansas Supreme Court to deny attor-

ney's fees should stand and no writ of certiorari issue to the Kansas Supreme Court.

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APPENDIX

APPENDIX A

(Filed January 4, 1980)

IN THE
DISTRICT COURT OF JOHNSON COUNTY, KANSAS

No. 77221

ASHOK K. GUMBHIR,
Plaintiff,

vs.

KANSAS STATE BOARD OF PHARMACY,
Defendant.

MEMORANDUM DECISION

The Court announces the following Memorandum Decision on the cross motions of the plaintiff and defendant for summary judgment with Findings of Fact and Conclusions of Law as required by rule of the Kansas Supreme Court and as is provided by law.

(Nature of Action)

This is an appeal from a decision of the Kansas State Board of Pharmacy, hereinafter referred to as Board, denying the plaintiff's application for examination and registration as a licensed pharmacist under the provisions of K.S.A. 1979 Supp. 65-1631. The plaintiff prosecutes this appeal under the provisions of K.S.A. 1979 Supp. 65-1628. The appeal consists of two areas of inquiry. The first is an appeal from an administrative decision of the Board finding the plaintiff ineligible to register as a licensed pharmacist in Kansas under the provisions of

K.S.A. 1979 Supp. 65-1631 because he received his undergraduate degree in pharmacy from an unaccredited foreign university. The plaintiff alleges the Board erroneously interpreted §(a) of the statute which requires that an applicant for registration be a graduate of a college or school of pharmacy, or department of a university accredited by the American Council On Pharmaceutical Education, hereinafter referred to as ACPE. The plaintiff, a professor of pharmacy, contends that his master and PHD degrees from American universities with accredited departments of pharmacy qualify him for registration by examination under §(a) of the statute and that together with his licenses to practice pharmacy in Missouri and Ohio, his post-graduate degrees qualify him for reciprocal registration under §(d) of the statute. The Board, on the other hand, contents that the statute requires a baccalaureate degree from an accredited department and that the plaintiff's post-graduate degrees do not satisfy this requirement.

Under the second area of inquiry, the plaintiff contends that if the Court finds the interpretation given the statute by the Board is correct, that the Court find the statute to be unconstitutional. He alleges denial of due process, equal protection, and unlawful delegation of authority as grounds for the unconstitutional basis of the statute.

Both parties have filed motions for summary judgment. The motions have been fully briefed and argued before the Court.

(Issues)

The following issues are presented by the motions for summary judgment:

(1) Whether or not the Board acted unreasonably and without supporting evidence in concluding that plain-

tiff's post-graduate degrees did not qualify him for registration under the provisions of K.S.A. 1979 Supp. 65-1631 which requires that an applicant be a graduate of a program accredited by the ACPE?

(2) Whether or not the provisions of K.S.A. 1979 Supp. 65-1631 are violative of the due process, equal protection, or unlawful delegation of authority standards in the federal and state constitutions?

(Findings of Fact)

The pleadings, briefs, and arguments of the parties reflect the following uncontroverted facts:

1. The plaintiff, Ashok K. Gumbhir, manages and is part owner of Wycliff Pharmacy, a division of G-J-K-W, Inc., located at 10354 Mastin, Overland Park, Johnson County, Kansas.

2. The plaintiff is a citizen of the United States and a resident of the State of Missouri.

3. The defendant, Kansas State Board of Pharmacy, is an administrative agency of the State of Kansas, organized and existing pursuant to K.S.A. 1979 Supp. 74-1603, et seq.

4. The plaintiff graduated and received a bachelor's degreee in pharmacy from Punjab University in Chandrigarh, India, in 1960.

5. The plaintiff graduated and received a master of science degree in pharmacy from the University of Minnesota, Minneapolis, Minnesota in 1968.

6. The undergraduate pharmaceutical program of the University of Minnesota is, and was at all times relevant hereto, "a school or college of pharmacy or department of

a university accredited by the American Council on Pharmaceutical Education and recognized and approved" by the Kansas State Board of Pharmacy.

7. The plaintiff graduated and received a PhD degree in pharmacy administration from Ohio State University in Columbus, Ohio, in 1971.

8. The undergraduate pharmaceutical program of Ohio State University is, and was at all time relevant hereto, "a school or college of pharmacy or department of a university accredited by the American Council on Pharmaceutical Education and recognized and approved" by the Kansas State Board of Pharmacy.

9. The plaintiff was registered as a licensed pharmacist in the State of Ohio by the Ohio State Board of Pharmacy, by examination in 1970.

10. The plaintiff still holds a license to practice pharmacy in the State of Ohio.

11. The plaintiff was registered as a licensed pharmacist in the State of Missouri by the Missouri State Board of Pharmacy, by reciprocity, in 1974.

12. The plaintiff still holds a license to practice pharmacy in the State of Missouri.

13. The plaintiff applied for registration in the State of Kansas by examination, by submitting the required application and fee in accordance with K.S.A. 1979 Supp. 65-1631(b).

14. The plaintiff also applied for registration in the State of Kansas by reciprocity (to Missouri and Ohio) by submitting the required application and fee in accordance with K.S.A. 1979 Supp. 65-1631(d)(g).

15. The defendant, Kansas State Board of Pharmacy, denied the plaintiff's applications for registration on the basis of K.S.A. 1979 Supp. 65-1631 which provides in part:

> (a) It shall be unlawful for any person to practice as a pharmacist in this state, unless such person is registered by the board as a pharmacist. Every applicant for examination and registration as a pharmacist shall be of good moral character and temperate habits, a graduate of a school or college of pharmacy or department of a university accredited by the American council on pharmaceutical education and recognized and approved by the board. . .
>
> (b) Notwithstanding the preceding provisions of this section, the board may in its discretion register as a pharmacist, without examination, any person who is duly registered by examination in some other state, provided that such person shall produce evidence satisfactory to the board of having had the required education and training . . . as required of applicants for registration under . . . the pharmacy act of this state.

16. The plaintiff timely filed this action in the District Court after receipt of a copy of the decision and order of the Kansas State Board of Pharmacy in accordance with K.S.A. 1979 Supp. 65-1628.

17. The plaintiff has exhausted all administrative remedies and prerequisites to the jurisdiction of this Court.

18. The American Council on Pharmaceutical Education does not accredit foreign or graduate schools such as those from which the plaintiff has graduated.

(Conclusions of Law)

I

THE BOARD ACTED REASONABLY AND WITH EVIDENCE TO SUPPORT ITS DETERMINATION THAT PLAINTIFF'S POST GRADUATE DEGREES DID NOT QUALIFY HIM FOR REGISTRATION UNDER THAT PORTION OF K.S.A. 1979 SUPP. 65-1631 WHICH REQUIRES THAT AN APPLICANT BE A GRADUATE OF A PROGRAM ACCREDITED BY THE AMERICAN COUNCIL ON PHARMACEUTICAL EDUCATION.

The first portion of the plaintiff's case concerns an appeal from an administrative decision. In this respect the scope of the Court's inquiry is, therefore, limited to whether the Board of Pharmacy acted within its scope of authority, whether there is evidence to support the contested determination by the Board, and finally whether the Board acted in a fraudulent, arbitrary, or capricious manner. See *Stice v. Gribben-Allen Motors, Inc.*, 216 Kan. 745 (1975); and *Neeley v. Board of Trustees*, 212 Kan. 137 (1973). There is a presumption in favor of the validity of the Board's action so that the burden of proving their action illegal rests upon the plaintiff. See *Moyer v. Board of County Commissioners*, 197 Kan. 23 (1966).

Plaintiff concedes that the Board was acting within the scope of the authority granted to it by the legislature to grant or deny applications for registration under the Pharmacy Act. The parties have agreed that the only issue in this portion of the case is whether the plaintiff's post graduate degrees qualify him for registration under the terms of K.S.A. 1979 Supp. 65-1631. However, in light of the limitations placed on judicial review of administrative decision, this issue must necessarily be phrased

as whether the Board acted reasonably and with supporting evidence when it made its determination.

An applicant for pharmacy examination and registration in the State of Kansas must meet the qualifications as provided in K.S.A. 1979 Supp. 65-1631(a). Under this statute every individual:

> "shall be of good moral character and temperate habits, *a graduate of a school or college of pharmacy or department of a university accredited by the American Council on Pharmaceutical Education and recognized and approved by the Board,* and shall file proof satisfactory to the Board, substantiated by proper affidavits, of a minimum of one year of pharmaceutical experience, acceptable to the Board, under the supervision of a registered pharmacist and shall pass an examination by the Board." (emphasis added)

Plaintiff argues that the statute should be interpreted to require only graduation from a school or college or department of a university which has a pharmaceutical program accredited by the ACPE and that it makes no difference whether the degree awarded is a bachelor's degree, a master's degree, or a doctorate degree. The Board correctly argues that this interpretation contravenes the clear language of the statute. They point out that the statute specifically requires that the school or college of pharmacy or the department of a university be accredited by the ACPE and that the latter accrediting agency does not accredit graduate degrees. It is clear to the Court that the statute refers to a program or course of study offered at such an educational institution and does not refer to the school or college in the broad sense. Typically, post graduate study is specialized and does not involve the broad range of skills which all general practitioners of the profession should possess.

The plaintiff's own post graduate record, which has been received and is on file in the record, supports this interpretation. Only four of the twenty-eight classes listed on his resume for graduate credit are classified under "pharmacy and pharmacology". The remaining classes fall under business and pharmacy administration. Most of his credits were earned in research from his dissertation topic entitled "Determination and Evaluation of Economic Significance of the Consumer Price Differentials Between Name and Generic Prescriptions".

A primary rule for the construction of a statute is to find the legislative intent from its language, and where the language used is plain and unambiguous and also appropriate to an obvious purpose the Court should follow the intent as expressed by the words used. See *City of Overland Park v. Nikias,* 209 Kan. 643, 498 P.2d 56 (1972) and *Underwood v. Allmon,* 215 Kan. 201, 523 P.2d 384 (1974). The unambiguous language of K.S.A. 1979 Supp. 65-1631 requires that the applicant be a graduate of the accredited program. This language is appropriate to the obvious purpose of the statute to protect the public health by assuring high qualifications of practicing pharmacists. On this basis, the Board's reasoning is sound that a graduate of graduate programs does not come within the language of the statute nor possess the qualifications that it requires.

To the contrary effect, the plaintiff offers only the broad statement that it is ridiculous to assume that a professor of pharmacy who possesses both a master and PhD degree in his field has not acquired the skills of a graduate of an accredited program. While there is merit in the plaintiff's statements, the contention misses the requirement of the statute, which simply requires the Board to determine whether the plaintiff was a grad-

uate of an accredited undergraduate pharmacy program, not whether he possessed the qualifications of such a graduate.

In making this determination, the Board did not solely rely on its own interpretation of the statute. As the administrative record reveals, the Board deferred its consideration of the plaintiff's applications until after it had requested and received an opinion of the Attorney General. See *Minutes of the Meeting of the Kansas State Board of Pharmacy*, February 11, 1978. That opinion advised that the Attorney General did not believe the plaintiff to be qualified to register under the provisions of K.S.A. 1979 Supp. 65-1631 or that the statute could be interpreted to allow the Board discretion to determine whether the plaintiff nonetheless possessed the qualifications of a graduate of an accredited program. This action on the Board's part refutes any implication that its final decision was in any respect fraudulent, arbitrary or capricious. Since the Board's decision was both reasonable and supported by evidence, this Court can find no basis upon which to set it aside.

II

THE PROVISIONS OF K.S.A. 1979 SUPP. 65-1631 DO NOT OFFEND CONSTITUTIONAL STANDARDS OF DUE PROCESS, EQUAL PROTECTION, OR UNLAWFUL DELEGATION OF AUTHORITY.

The plaintiff's first attack on the constitutionality of K.S.A. 1979 Supp. 65-1631 is that the statute violates the Due Process Clause of the Fourteenth Amendment because it is vague and ambiguous. He has provided little supporting argument for this contention other than a broad allegation that one reading the statute does not immediately comprehend that an applicant must be a graduate

of an undergraduate pharmacy program accredited by the ACPE. He does not propose the standard of clarity which he thinks the statute should meet.

The Board argues that the statute is non-criminal and must satisfy a less strict standard than a penal statute. It reasons that a statute which is non-criminal should be held unconstitutionally vague only when "its language does not convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice". *Annot. Supreme Court's Application of Vagueness Doctrine in Non-Criminal Statutes or Ordinances,* 40 L.Ed. 2d 823, 826 (1975). A non-criminal statute is not unconstitutionally vague "where it is set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *Id.*

Although K.S.A. 1979 Supp. 65-1631 does make the practice of pharmacy without a license unlawful, it does not prescribe a penalty and its overall effect indicates a legislative intent to regulate to protect the public good.

> "It is the substance and effect of the statute, rather than its form, that is to be considered in determining whether it is penal. Thus, laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good are not, in a strict sense, penal acts, although they may inflict a penalty for their violation." 82 C.J.S. §389 (footnotes omitted; *Director of Patuxent Institution v. Daniels,* 243 Md. 16, 221 A.2d 397, cert. denied, 385 U.S. 940 (1966).

It appears, then, that the Board has correctly classified the statute as non-criminal and identified the correct vagueness standard to apply.

The Board argues that K.S.A. 1979 Supp. meets this standard for the same reasons that support the Board's interpretation of the statute, that is, that the wording of the statute is clearly to the effect that the applicant must have graduated from the accredited program and that since the ACPE does not accredit graduate programs, the statute cannot sensibly be read to mean anything but an undergraduate program.

The statute is clear in that it requires graduation from a "school or college of pharmacy or department of a university accredited by ACPE". The ACPE does not accredit schools or colleges or graduate programs but accredits undergraduate programs within such schools or colleges. The statute as phrased does not create any ambiguity and the only determination that an applicant must make is whether or not the program in which he is enrolled or has graduated from is, in fact, accredited by the ACPE. The Court concludes that K.S.A. 1979 Supp. 65-1631 contains the necessary standard of clarity required of a non-criminal statute.

The plaintiff's next attack on the constitutionality of K.S.A. 1979 Supp. 65-1631 is that it violates the Equal Protection Clause of the Fourteenth Amendment. Plaintiff accurately states that the Act establishes two distinct classes. The two classes being: (1) those who received undergraduate degrees from a school or college of pharmacy or department of a university; and (2) those who received undergraduate, graduate, or doctoral degrees from some other non-accredited schools of pharmacy. Plaintiff contends that the classification scheme has no sound basis for the alleged distinctions between them and cannot be upheld in light of the Equal Protection Clause of the federal constitution. He strenuously argues that since the ACPE does not accredit foreign schools, the classification is in

effect based on the suspect trait of alienage and so must be subjected to the strict scrutiny required by cases such as *Graham v. Richardson*, 403 U.S. 365 (1971).

As pointed out by counsel for the Board, the majority of cases which have been cited by the courts on the issue of equal protection and accreditation requirements have involved attorneys.

Most of the cases were brought by graduates of unaccredited law schools who had sought permission to take state bar exams but were denied the same for the reason that the state required that prior to taking the bar exam, an individual must have graduated from an accredited law school. The holdings in those cases have uniformly been that the requirement that one graduate from an accredited law school does not violate the Equal Protection Clause. In *Ostroff v. New Jersey Supreme Court*, 415 F. Supp. 326 (D. N.J. 1976) the Court in addressing an equal protection argument stated:

> "It is clear to this Court that the State has a rational basis for the requirement that applicants for admission to the State Bar be graduates of a law school approved by the American Bar Association. The basis for the requirement set forth in Rule 1:24-2(b) (requiring undergraduate schools to be accredited) is not as compelling as the prerequisite referred to above, this Court will not second guess the wisdom of the New Jersey Supreme Court in promulgating it. Under any of the descriptions of rationality heretofore used by Courts, we cannot say that there is a clear lack of connection between the rule and the plaintiff's fitness or capacity to practice law. The rule is not invidiously discriminatory and does not violate the equal protection clause of the 14th Amendment." (p. 329) Also, see *Wilson v. Board of Gov-*

ernors, Washington State Bar Association, Wash., 585 P.2d 136 (1978) and *In re Application of Brian M. Hansen,* 275 N.W. 2d 790 (1978).

After careful consideration of this argument the Court finds no basis for the plaintiff's contention that the statutory classification in this case is based on alienage. The statute, in fact, classifies on the basis of education and distinguishes between applicants whose education has met the standards of the ACPE and those whose education has not met those standards. Since the ACPE does not accredit foreign schools, it is quite possible that the latter class, those who have graduated from unaccredited schools, will contain a higher percentage of aliens, but aliens are not necessarily included in or excluded from either group. Put another way, since the statute does not require an applicant to be a citizen, an alien with an accredited education is every bit as welcome to apply for registration as is an American with the requisite education. In this respect, the plaintiff's reliance on the case of *Wong v. Hohnstrom,* 405 F. Supp. 727 (D. Minn. 1975), holding that the state of Minnesota could not constitutionally require applicants under its pharmacist registration statute to be U.S. citizens, is misplaced.

In this situation, the plaintiff's position is similar to that of an American applicant who has graduated from a school which has never applied for accreditation. In the case of *In re Application of Hansen,* 275 N.W. 2d 790 (Minn. 1978) a requirement that applicants to the Bar be graduates of ABA approved schools was upheld in the face of a challenge by an applicant who graduated from a school which was not accredited because it had never applied for accreditation. The Court found that since the requirement was reasonably related to the state's interest in a competent Bar it would be upheld and the Court

need not consider alternatives proposed by the plaintiff. In that case, as here, the plaintiff asked that the Board of Law Examiners be required to review his qualifications despite the accreditation requirement. The Court refused on the grounds that to require the Board to individually review the applications of all graduates of unaccredited schools would place too great a burden on the Board.

There still remains for consideration the plaintiff's claim that there is no sound reason for distinguishing between graduates of ACPE accredited schools and graduates of unaccredited schools. Since the classification created by the accreditation requirement is not based on alienage and since there is no "fundamental interest" involved, it is necessary only to find that the accreditation requirement is reasonably related to the state's interest in providing competent pharmacists to protect the public health. *St. ex rel Schneider v. Liggett,* 223 Kan. 610 (1978). This requires an examination of the standards which the ACPE uses in its accreditation process. Those standards relate to such important qualities of education as faculty-student ratios, classroom and clinical facilities, and financial resources of the pharmacy program. The direct relationship between these factors and the quality of education offered by a particular program is difficult to dispute. It has been noted by many courts, primarily in the context of bar admission cases. See e.g., *In re Application of Hansen,* 275 N.W. 2d 790 (Minn. 1978); *Wilson v. Board of Governors,* 585 P.2d 136 (Wash. 1978).

The state's interest in assuring a competent field of practicing pharmacists, as it is in assuring a competent Bar, is unquestionably great. The filling of prescriptions and dispensing of dangerous drugs has such an obvious and direct impact on the public health as hardly to need mentioning. This important state interest gives to the

legislature a wide range of discretion in classifying applicants for registration as pharamcists to assure that those who are licensed are highly qualified to practice. In such situations, the Equal Protection Clause does not require that the classifications be established with mathematical precision and in the absence of proof that the classification is arbitrary, unreasonable or unrelated to the statute's purpose, the fact that it may exclude a few qualified applicants must be tolerated. See *St. ex rel Schneider v. Liggett*, 223 Kan. 610 (1978), *Manzanares v. Bell*, 214 Kan. 589 (1974). In this case, the Court does not seriously doubt that the plaintiff may be a quite competent pharmacist but he has not met his burden of showing the classification of K.S.A. 65-1631 so unreasonable as to warrant this Court's invalidation of the statute on equal protection grounds.

The plaintiff's final attack on the constitutionality of K.S.A. 65-1631 is that it unlawfully delegates legislative power to a private organization outside the control of Kansas jurisdiction. The defendant supports the provision by citing numerous case, again in the context of the legal profession, which have rejected this argument. See e.g., *Appeal of Murphy*, 393 A.2d 369 (Pa. 1978); *Potter v. N.J. Supreme Court*, 403 F. Supp. 1036 (D. N.J. 1975); *In re Application of Hansen*, supra. These cases have held that the courts (who promulgate attorney standards) have not delegated authority but adopted the standards of the accrediting agency in order to avoid the inconvenience and burden resulting to the licensing board by requiring that it review individually the educational institution of each applicant. He argues, on the basis of *Water Dist. 1 v. Robb*, 182 Kan. 2 (1957) that in this instance the legislature has merely delegated to the ACPE the

power to determine some fact or state of things upon which the law becomes effective.

In order to ascertain the effect of the clause at issue, it is necessary to examine it in context. The sentence reads, "Every applicant . . . shall be . . . a graduate of a school or college of pharmacy or department of a university accredited by the American council on pharmaceutical education *and recognized and approved by the board . . .*" (emphasis added). It is clear that the delegation of authority by the statute goes to the Board, not to the ACPE. In other words, as the defendant argues, the clause requiring accreditation is not a delegation to the ACPE without guiding standards, rather, it is the standard by which the Board of Pharmacy is to exercise the power delegated to it. The reference to the ACPE merely allows the Board to factually determine whether the applicant's educational background meets the standards which the legislature believes requisite of a competent pharmacist.

The ACPE is comprised of professional educators and pharmacists who are better qualified to determine the competency of any pharmaceutical education than the legislators or the Board. It is not unreasonable for the legislature to rely on that expertise. To the contrary, if it were not to do so, it would be necessary to develop a comprehensive set of standards for the Board of Pharmacy to use in determining the sufficiency of each applicant's education. Moreover, requiring the Board to investigate the program offered by each applicant's school would be a time consuming and expensive job. Instead, the legislature has chosen to rely on the standards chosen by experts in the field of accrediting and free the Board to spend time on its other important functions.

(Decision)

This Court has carefully considered the pleadings and briefs filed by the respective parties and the arguments of counsel. After due consideration thereof, and for the reasons set out above, this Court has determined that the defendant's motion for summary judgment should be granted and the plaintiff's motion for summary judgment should be denied. The decision of the Board of Pharmacy to deny the plaintiff's applications for registration was not arbitrary, capricious or fraudulent. Nor is K.S.A. 1979 Supp. 65-1631 unconstitutionally vague, violative of equal protection or an unlawful delegation of legislative authority. Therefore, the defendant's motion for summary judgment is granted. The attorney for defendant is directed to prepare a journal entry reflecting the above findings and order and may incorporate the above memorandum decision therein.

/s/ Herbert W. Walton
Herbert W. Walton
District Judge
Division No. 1

January 4, 1980

APPENDIX B

(Filed July 9, 1981)

IN THE
DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT

Case No. 77221

ASHOK K. GUMBHIR,
Plaintiff,

v.

KANSAS STATE BOARD OF PHARMACY,
Defendant.

MEMORANDUM DECISION

The Court announces the following memorandum decision on the plaintiff's motion for assessment of costs of this matter to the defendant and in favor of the plaintiff, pursuant to the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988.

(Nature of Action)

This action arises out of litigation undertaken by the plaintiff in order to secure registration to practice pharmacy in the State of Kansas. In this motion plaintiff requests that the Court assess the costs incurred in obtaining such registration to the defendant Kansas State Board of Pharmacy. The following is a brief history of the facts of the case.

The plaintiff, a United States citizen and Missouri resident, applied for registration in the State of Kansas by examination and by reciprocity. He was denied regis-

tration by the Kansas State Board of Pharmacy, hereinafter referred to as the Board, based on the Board's interpretation of K.S.A. 1979 Supp. 65-1631.

Plaintiff appealed the Board's decision under the provisions of K.S.A. 1979 Supp. 65-1628, under two separate theories. Under the first theory plaintiff alleged that the Board erroneously interpreted section (a) of the statute, which requires that an applicant for resigtration be a graduate of a college or school of pharmacy, or department of a university accredited by the American Council on Pharmaceutical Education, hereinafter referred to as ACOPE.

Secondly, plaintiff contended that the statute was unconstitutional. The primary attack against the constitutionality of this statute was the claim that K.S.A. 65-1631 (a) of the Kansas Pharmacy Act constituted an unlawful delegation of legislative authority to a nongovernmental agency, ACOPE, which delegation is impermissible under the Constitution of the State of Kansas. Plaintiff also included in his petition a more general allegation that the statute was discriminatory and violative of the First, Fifth, and Fourteenth Amendments of the Constitution of the United States.

After receiving the adverse decision by the Board, plaintiff appealed the Board's decision by filing an action in the District Court of Johnson County. In an opinion filed January 4, 1980, the Board's order denying the plaintiff's registration was upheld.

Plaintiff then appealed the District Court decision to the Kansas Supreme Court. The Supreme Court reversed the District Court decision in an opinion filed November 1, 1980. The Court's decision was based upon a finding that K.S.A. 1979 Supp. 65-1631(a) was violative of the Kansas

Constitution, Article 2, section 1, because the statute resulted in an unconstitutional delegation of legislative authority to a non-governmental agency.

Having decided that this portion of the statute was constitutionally impermissible, the Supreme Court found it unnecessary to examine the other constitutional questions and issues raised by the plaintiff concerning the Board's refusal to permit examination and registration. *Gumbhir v. Kansas State Board of Pharmacy*, 228 Kan. 569, 588, ... P2d ..... (1980).

On April 10, 1981, plaintiff filed a "Motion for Assessment of Costs," requesting that the Court assess all costs and attorney's fees incurred in this matter against the defendant. While plaintiff cited both federal and state statutes as the basis for his motion, he indicated his intention at oral argument held on May 28, 1981 to rely primarily on 42 U.S.C. §1988 as authority entitling him to costs and fees incurred in obtaining registration. Therefore this issue will be decided on the basis of 42 U.S.C. §1988.

(Issue)

Whether plaintiff should be permitted to recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976 if he is the prevailing party in a state court action which does not allege a violation of section 1983, and which is decided on the basis of a violation of the state constitution.

(Conclusions of Law)

In this case of apparent first impression in the State of Kansas, the Court has the duty to interpret the meaning and scope of 42 U.S.C. §1988, as it applies to the facts of this case. Plaintiff, the prevailing party on the substantive

issues presented in this proceeding, now asks this Court to assess the costs and attorney's fees involved in appealing the Board's decision to the Kansas Supreme Court to the defendant.

The pertinent portion of the statute, 42 U.S.C. §1988, reads as follows: "In any action or proceeding to enforce a provision of sections . . . 1983 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."

The Court is mindful that the purpose of the 1976 amendment to section 1988 was to encourage the private citizen to take action, as a "private attorney general," to enforce civil rights laws and that the law should be construed to effectuate its purpose. 5 *U.S. Code Cong. & Admin. News,* pp. 5908, 5909-5910; *Young v. Toia,* 413 N.Y.S. 2d 530, 531 (1979).

At the same time the language of the amendment clearly indicates that the awarding of attorney's fees lies within the sound discretion of the Court. *Young,* supra, 413 N.Y.S. 2d at 532.

Section 1983 establishes a cause of action whereby a party who has suffered a deprivation of a federally secured right, privilege, or immunity under color of state law can obtain appropriate relief. The question, therefore, is to what extent is the awarding of attorney's fees to the prevailing party in this lawsuit related to the cause of action established by section 1983. *The Enforceability and Proper Implementation of §1983 and the Attorney's Fees Awards Act in State Courts,* 20 Ariz. L. Rev. 743, 762 (1980).

Perhaps even more to the point is whether plaintiff has in fact prevailed on a section 1983 claim. The defendant strenuously asserts that he has not. Defendant's brief points out that the statute was found to be unconstitutional

by the Kansas Supreme Court because it constituted an unlawful delegation of authority by the Kansas Legislature.

Indeed, this issue was raised by the plaintiff within the context of the rights and privileges secured under the Kansas Constitution. In fact Plaintiff's petition makes no mention of 42 U.S.C. §1983 in asserting a cause of action against the Board.

Plaintiff asserts that his petition stated a cause of action against the Board under 42 U.S.C. §1983, and that it is not necessary that the statute be specifically cited in the petition in order for him to prevail on this claim for costs, including attorney's fees. He cites as support *Harradine v. Board of Supervisors,* 425 N.Y.S. 2d 182 (1980), where such relief was granted even in the absence of a specific reference to §1983.

In *Harradine*, an appeal was taken by a county board of supervisors from an order requiring it to pay legal fees to plaintiff's attorneys in a voting rights case involving the "one person-one vote" rule. The issue presented to the New York court was whether the plaintiff was entitled to recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976 if he is the prevailing party in a state court suit which does not allege a violation of section 1983, but seeks to enforce federal civil rights. 425 N.Y.S. 2d at 187. The New York Court of Appeals found that he was:

> "in view of the number of apportionment cases brought in federal court pursuant to section 1983, the similarity in language of section 1983 and section 1 of Article 1 of the New York State Constitution, the policy behind section 1988 which is to encourage the private citizen to take action as a 'private attorney general,' and the

> fact this action is premised upon a constitutional claim. . . . Plaintiff's cause of action is embraced within the spirit of section 1983 and Special Term implicitly found a violation of this section." [citation omitted]

425 N.Y.S. 2d at 188.

The same consideration, however, is not present in this case. There is no similarity in language between section 1983 and section 1 of Article 2 of the Constitution of the State of Kansas. There is little evidence to support plaintiff's cause of action premised upon a federal constitutional claim, other than a general allegation that the statute is unconstitutional because it violates plaintiff's constitutional rights under the due process and equal protection clauses of the Kansas and United States Constitutions.

Finally, there has been no showing by the plaintiff that his cause of action is embraced within the spirit of section 1983, which prohibits the infringement of "rights, privileges, or immunities secured by the [U.S.] Constitution and laws," nor that the Kansas Supreme Court implicitly found a violation of this section.

Section 1983 redresses neither common law nor state protected rights. *Morrison v. Fox*, 483 F. Supp. 390, 395 (W.D.Penn. 1979); *Civil Rights Suits Against State and Local Governmental Entities and Officials*, 53 So. Calif. L. Rev. 945, 952 (1980). The Kansas Supreme Court's decision in this case rested squarely upon state constitutional grounds. Rights guaranteed solely by the state constitution and state law are not actionable under 42 U.S.C. §1983. *Shutt v. Moore*, 613 P.2d 1188, 1190 (Wash. App. 1980)

The plaintiff's allegations of constitutional violations under the First, Fifth, and Fourteenth Amendments of the

United States Constitution are neither specific nor supported by facts and cannot provide the basis for granting plaintiff attorney's fees under the Act. *Shutt*, supra, at 1190.

Although the foregoing discussion is determinative of the outcome of the case, two other points raised in the parties' briefs deserve some discussion.

First, defendant states that section 1983 was intended to give a cause of action to plaintiffs in federal courts exclusively. According to the defendant's brief the statute was intended to provide aggrieved plaintiffs a remedy to redress abuses of power by state officials and therefore "it seems antithetical that the statute would grant two states the authority to review such actions."

While the development of section 1983 has led to a good deal of confusion over the jurisdictional grant of the statute, the majority of courts and legal commentators have agreed that section 1983 provides concurrent jurisdiction between state and federal courts. 20 *Ariz. L. Rev.* at 744; *Harradine v. Board of Supervisors*, 425 N.Y.S. 2d 182, 188, n.7 (1980).

State courts clearly have concurrent jurisdiction to entertain claims under section 1983. *Shapiro v. Columbia Union National Bank & Trust Company*, 576 S.W. 2d 310 (Mo. 1978), cert. den. 444 U.S. 831, 100 S. Ct. 60, 62 L. Ed. 2d 40.

The defendant's argument in this regard is very similar to that made by the defendant in *Maine v. Thiboutot*, 100 S. Ct. 2502 (1980), that is, jurisdiction to hear section 1983 claims rests exclusively with the federal courts. On this issue the Supreme Court held that "any doubt that state courts may also entertain such actions was dispelled by *Martinez v. California*, 444 U.S. 277, 283, n. 7, 100 S. Ct.

553, 558, n. 7, 62 L.Ed. 2d 481 (1980)." There, while reserving the question whether state courts are obligated to entertain §1983 actions, the Supreme Court held that Congress had not barred them from doing so. *Maine v. Thiboutot*, 100 S.Ct. 2502, 2503, n. 1 (1980).

The point to be made here is that under the proper circumstances a section 1983 claim may be brought in a Kansas state court, and an award of attorney's fees may be granted to the prevailing party under section 1988. *Harradine v. Board of Supervisors*, supra, is illustrative of the kind of circumstances in which a plaintiff is awarded attorney's fees in order to effectuate the remedial purposes of the Act. Plaintiff's cause of action against the State Board of Pharmacy, however, is not of that nature which the drafters of this legislation intended to include within its purview.

Mention must also be made of the contention made by the defendant that the State Board of Pharmacy is not a "person" within the meaning of section 1983, which creates a civil action for the deprivation of rights, privileges, or immunities secured by the Constitution and laws by "persons" acting under color of state law. The defendant asserts that under current case law departments and agencies of state, county, or local governments are not "persons" for 1983 purposes. *Cullen v. N.Y. State Civil Services Commission*, 435 F. Supp. 546 (E.D.N.Y. 1977).

The federal district court in *Cullen*, supra, while acknowledging that there is "no rule of thumb . . . controlling on the question whether independent agencies are to be considered 'person' (for) the purposes of section 1983," 435 F. Supp. at 556, proceeds to list several factors which have been mentioned in case law as relevant as to whether a state agency is a "person" under section 1983.

Among those factors are the following:

(1) whether the agency's funds are appropriated by the state for its use as though it were a state department;

(2) whether the state is liable for the agency's debts; and

(3) whether the agency performs a function of government that serves the public interest.

435 F. Supp. at 557.

The concept of what is included with the term "person" for 1983 purposes continues to evolve, as recent United States Supreme Court cases indicate. See, e.g., *Monell v. Department of Social Services*, 426 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

In *Cullen*, supra, the civil service commissions named as defendants were simply "departments" of state, county, and municipal governments and therefore could not be considered persons within the meaning of the statute. Whether the same could be said of the Kansas State Board of Pharmacy is a question which the Court is not called upon to decide in this opinion, in light of the holding that plaintiff has not prevailed upon a section 1983 claim in the case and therefore is not entitled to an award of attorney's fees under section 1988.

Nor should this decision be read as an endorsement of the specific test enunciated in the *Cullen* case. While these factors may be helpful in determining whether a state agency is a "person" for 1983 purposes, they should by no means be considered the only relevant elements necessary to make such a determination in the proper case.

(Decision)

After careful consideration of the memoranda and briefs submitted by the parties, and for the reasons stated above, it is the decision of this Court that plaintiff's "Motion for Assessment of Costs" pursuant to 42 U.S.C. §1988, commonly known as the "Civil Rights Attorney's Fees Awards Act of 1976" be denied.

Counsel for the defendant is directed to prepare the Journal Entry of this decision and is granted leave to incorporate the memorandum decision in the journal by reference.

/s/ Herbert W. Walton
Herbert W. Walton
District Judge
Division No. 1

July 9, 1981

Office - Supreme Court, U.S.
FILED
DEC 21 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-427

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ASHOK K. GUMBHIR,
Petitioner

vs.

KANSAS STATE BOARD OF PHARMACY,
Respondent

On Writ of Certiorari to the
Supreme Court of the State of Kansas

REPLY BRIEF OF PETITIONER

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I. INTRODUCTION.

The Brief in Opposition filed herein by the defendant-respondent clearly demonstrates the point of departure upon which this case must be decided and constitutes eloquent testimony in favor of a grant of certiorari. Petitioner is compelled to Reply to the Respondent's Brief in Opposition and to respond to the new arguments contained in respondent's brief.

II. THE LOWER COURT APPLIED, AND RESPONDENT URGES, AN INAPPROPRIATE STANDARD.

A. The Kansas Supreme Court did not apply the appropriate standard in deciding, as a matter of law, to deny petitioner's request for attorneys' fees under 42 U.S.C. §1988, after finding that he was the prevailing party in an action brought under 42 U.S.C. §1983. The Kansas Supreme Court applied, and the respondent appears to be arguing, a standard which would require a finding that federal constitutional claims to be meritorious, upon detailed inquiry, before there can be an award under the Civil Rights Attorney's Fees Act. However, the statute authorizes an award of fees to "the prevailing party," in "any action or proceeding to enforce", *inter alia*, 42 U.S.C. §1983.

By the terms of the statute, then, one need only be the prevailing party in a suit containing a claim under the Civil Rights Acts; it does not require that the party have prevailed on that particular claim. The legislative history and the majority of the case authorities construing the statute have so stated: the inquiry is only to determine whether the federal claim, not wholly insubstantial, has been joined with the state law claim arising from the same common nucleus of operative fact.

Respondent has failed to cite a single authority which supports a detailed inquiry into the merits of a plaintiff's federal claims before attorneys' fees are awarded.

The decision of the Kansas Supreme Court not only applied an inappropriate standard, it conflicted with many other lower court decisions. Certiorari is required to resolve this conflict and to state the correct standard to be applied.

B. Respondent's brief then appears to acknowledge that the "substantial/common nucleus of operative fact" standard is applicable. But respondent improperly interprets this to mean that attorneys' fees will be justified only after an in-depth evaluation establishes the federal claims to have been meritorious. However, "substantial" has never been interpreted in that manner by other Courts, including this Court. Such an interpretation directly conflicts with this Court's ruling in *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), which has heretofore been universally held applicable to attorneys' fees claims under 42 U.S.C. §1988.

C. Finally, respondent attempts to uphold the decision of the Kansas Supreme Court by arguing that petitioner's contentions below under the federal Civil Rights Acts were not "substantial" and did not arise from a nucleus of operative fact in common with the state law claims. In making that argument the respondent has not only incorrectly defined "substantial", it has also incorrectly defined "common nucleus of operative fact."

In the present case, petitioner's federal constitutional claims were not obviously frivolous or clearly insubstantial; therefore, by definition and for purposes of an attorneys' fees award, the claims were "substantial." Further, petitioner's federal law claims arose from the identical facts as the state law claims, so the federal claims arose from a common nucleus of operative fact.

Petitioner requests the Court to make a final statement of the applicable standard and to define the terms used therein as most lower courts have done.

III. PETITIONER PROPOSES THE APPROPRIATE STANDARD FROM THE MAJORITY OF LOWER COURT DECISIONS AND THE LEGISLATIVE HISTORY.

A. Respondent relies on a noncontextual quotation from this Court's opinion in *White v. New Hampshire Department of Employment Security,* 455 U.S. --, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982), to support his contention that

there must be a determination "if the plaintiff's civil rights have been violated". Brief in Opposition, page 2.

The *White* case involved only the issue of whether a post-judgment motion for attorneys' fees was timely. The timeliness of Dr. Gumbhir's request for attorneys' fees is not an issue in the present case. This Court did not speak, in *White,* to the issue of the definition or scope of inquiry into the plaintiff's federal civil rights claims for purposes of determining attorney's fees.

B. In issue in the present case is the appropriate definition of a "substantial federal claim arising from a common nucleus of operative fact".

It would appear from the Brief in Opposition that respondent denies the applicability of the test which upholds federal claims as substantial if they are not "wholly insubstantial", "obviously frivolous", "plainly insubstantial", or "obviously without merit". Brief in Opposition, page 6.

Yet that is the exact definition stated by the Courts in defining "substantial" for purposes of pendent jurisdiction or for purposes of awarding attorneys' fees under 42 U.S.C. §1988. See Petition for Writ of Certiorari, pages 7 and 11.

Respondent argues the existence of a two-pronged test for determining whether to award to a plantiff attorneys' fees when he has prevailed on state law grounds. Brief in Opposition, page 6. Respondent then proceeds to confuse the two "prongs" of the test.

If there are two prongs established by legislative and judicial history, they are (1) that the federal claims arise from a common nucleus of operative fact, and (2) that the federal claims be substantial. H.R. 94-1558, 94th Cong., 2d Sess., p.4, n.7 (1976).

1. The "common nucleus of operative fact" standard merely requires that the facts relative to the federal law and state law claims be basically similar, so that a plaintiff would be expected to try them both in a single action. *Hatridge v. Aetna Casualty & Surety Company,* 415 F.2d 809, 816-817 (8th Cir. 1969); *Hargrave v. Oki Nursery, Inc.,* 646 F.2d 716 (2d Cir. 1980).

The foundation of this rule is the Court's interest in having a litigant's whole case tried at one time. See, e.g. *Baltimore Steamship Company v. Phillips,* 274 U.S. 316, 320, 47 S.Ct. 600, 71 L.Ed. 1069 (1924) and *United States v. California & Oregon Land Company,* 192 U.S. 355, 358, 24 S.Ct. 266, 48 L.Ed. 476 (1904).

In *Associated General Contractors of California v. San Francisco Unified School District,* 616 F.2d 1381 (9th Cir. 1980), cert. den., sub. nom. *National Association of Minority Contractors v. Associated General Contractors of California,* 449 U.S. 1061, 66 L.Ed.2d 603, 101 S.Ct. 783 (1980), the Court of Appeals properly held that pendent jurisdiction existed over a state law claim challenging the adoption of regulations by a state administrative agency when that claim was joined with a civil rights claim brought under 42 U.S.C. §§1981 and 1983. 616 F.2d at 1384.

Similarly in the present case, petitioner's state law claim challenging the state statute was joined with a claim under 42 U.S.C. §1983. Those claims arose from a "common nucleus of operative fact."

In *Hagans v. Lavine,* 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974), upon which respondent places reliance, there were federal and state law claims arising from identical facts. There was a single wrong done to the plaintiff. In the present case there were federal and state law claims arising from identical facts and there was a single wrong: the denial of registration to Petitioner as a pharmacist. Identical facts are, *a fortiori,* "inextricably woven."

Of importance to note is the absence of reference in the Brief in Opposition of a single particular in which the operative facts of Dr. Gumbhir's federal and state claims differ.

Clearly, where the federal claims arise from the same facts as the state law claims, there is a "common nucleus of operative fact." *Sanchez v. Lowell Leberman, Inc.,* 79 F.R.D. 21, 23 (W.D. Tex. 1978); *Kaminski v. Shawmut Credit Union,* 416 F. Supp. 1119, 1123 (D. Mass. 1976); *Garza v. Chicago Health Clubs, Inc.,* 347 F.Supp. 955, 960 (N.D. Ill, 1972).

Thus petitioner requests the Court to hold that the first prong of the test requires the federal law and state law claims to arise from a common nucleus of operative fact and that this test is met when the claims are based upon the same facts.

2. The other prong of the *Hagans/Gibbs* test found in the legislative and judicial history of the Civil Rights Attorneys' Fees Act is that the federal claims must have been "substantial". Petitioner requests this Court to adopt this test and to give to the term "substantial" the definition applied by the Court in pendent jurisdiction cases.

In pendent jurisdiction cases, the Courts have defined a "substantial" federal claim to be one which is "not wholly insubstantial."

> Over the years this Court has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit,' *Newburyport Water Co. v. Newburyport,* 193 U.S. 561, 579, 48 L.Ed. 795, 24 S.Ct. 553 (1904); "wholly insubstantial," *Bailey v. Patterson,* 369 U.S. 31, 33, 7 L.Ed.2d 512, 82 S.Ct. 549 (1962); "Obviously frivolous," *Hannis Distilling Co. v. Baltimore,* 216 U.S. 285, 288, 54 L.Ed. 482, 30 S.Ct. 326 (1910)"plainly unsubstantial," *Levering & Garrigues Co. v. Morrin,* 289 U.S. 103, 105, 77 L.Ed. 1062, 53 S.Ct. 549 (1933); or "no longer open to discussion," *McGilvra v. Ross,* 215 U.S. 70, 80, 54 L.Ed. 95, 30 S.Ct. 27 (1909).
>
> *Hagans v. Lavine, supra,* 415 U.S. at 537.

The only inquiry required is to determine whether the claims were "*wholly* insubstantial" or "*obviously* frivolous." These emphasized words are of legal importance because claims are insubstantial only if their unsoundness is so clear that there is no room for the inference that the claims can be the subject of controversy. *Goosby v. Osser,* 409 U.S. 512, 518, 93 S.Ct. 854, 35 L.Ed.2d 36 (1973); *Ex Parte Poresky,* 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed. 152 (1933).

Conversely, the definition of the term "substantial" by the Kansas Supreme Court in this case establishes ample

justification for certiorari, because the Kansas court defined "substantial" to mean "meritorious". Certiorari is needed to state specifically the standard by which the federal claims of a prevailing plaintiff are to be measured in deciding whether to award attorneys' fees and to define the terms used in that standard for the guidance of the lower courts in applying the Civil Rights Attorneys' Fees Act.

IV. CONCLUSION.

Contrary to respondent's argument, Brief in Opposition, page 5, this petitioner does not now argue, and he has never argued, that the "mere allegation" of a federal civil rights claim in conjunction with a state law claim would give rise to an award of attorneys' fees under 42 U.S.C. §1983. Petitioner does contend that this Court should take this opportunity to confirm and make universal the majority rule in this country; in order to determine whether to award attorneys' fees under the Civil Rights Attorneys' Fees Act in a case where plaintiff has prevailed on state law grounds (which had been joined with federal law grounds upon which there was no ruling), the Court should decide (1) whether the federal law claims were wholly insubstantial or obviously without merit, and (2) whether the federal law claims arose from the same basic factual setting.

Petitioner requests the Court to grant certiorari.

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